Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UTAH FOAM PRODUCTS CO., a Utah Corporation,

Petitioner,

vs.

UPJOHN COMPANY, a Delaware Corporation, and DOES I-X,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

C. RICHARD HENRIKSEN, JR.
Counsel of Record
RALPH W. CURTIS
HENRIKSEN & HENRIKSEN, P.C.
Attorneys for Petitioner
320 South 500 East
Salt Lake City, Utah 84102
(801) 521-4145

150662

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

94PP

QUESTION PRESENTED

Is a civil litigant entitled to a ruling on the merits of a Petition for Rehearing when that Petition for Rehearing was timely filed under the requirements set forth in Rules 25, 26, 31, 32, and 40 of the Federal Rules of Appellate Procedure, which rules indicate that the Petition for Rehearing is to be filed and served in the same manner as a brief filed with the Court of Appeals.

STATEMENT PURSUANT TO RULE 29.6

There are no parent, partially-owned subsidiaries and/or affiliated corporations to Utah Foam Products Company.

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The Petitioner, Utah Foam Products Company, respectfully requests that a writ of certiorari be issued to review the ruling of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit ruling denying the Petition for Rehearing is not published, but is attached hereto as Appendix A. The United States Court of Appeals for the Tenth Circuit ruling denying the Objection to Denial of Rehearing and Request for Ruling is not published, but is attached hereto as Appendix B. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Utah Foam Products Co. v. Upjohn Company*, 154 F.3d 1212 (10th Cir. 1998), and is attached hereto as Appendix C. The opinion of the district court is reported as *Utah Foam Products Co. v. Upjohn Company*, 930 F. Supp. 513 (D. Utah 1996), and is attached hereto as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on September 4, 1998. The Court of Appeals denied a Petition for Rehearing on October 14, 1998 (App. A). The Court of Appeals denied an Objection to Denial of Rehearing and Request for Ruling on November 25, 1998 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Federal Rule of Appellate Procedure 40 provides in relevant part:

> (a) A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. . . .
>
> (b) The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. . . .

Federal Rule of Appellate Procedure 31 provides in relevant part:

> (b) Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number. . . .

Federal Rule of Appellate Procedure 32 provides in relevant part:

> (b) Petitions for rehearing shall be produced in a manner prescribed by subdivision (a) (setting forth the typographic requirements for briefs submitted to the Court of Appeals).

Federal Rule of Appellate Procedure 25 provides in relevant part:

> (a) Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. . . .

Federal Rule of Appellate Procedure 26 provides in relevant part:

> (a) In computing any period of time prescribed or allowed by these rules, . . . the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. . . .

STATEMENT OF THE CASE

The fundamental question in this petition is whether a litigant who files a timely Petition for Rehearing pursuant to the requirements and provisions of the Federal Rules of Appellate Procedure is entitled to a ruling on the merits of the Petition for Rehearing. This petition arises in the context of the Court of Appeals refusing to consider the Petition for Rehearing on the grounds that it was untimely, and refusing to rule on the merits of the Petition when the Petitioner filed an objection setting forth specific evidence showing that the Petition for Rehearing was filed timely under the requirements

of the applicable Federal appellate rules. The effect of the Court of Appeals actions is to bring an improper, procedurally unfair end to a long course of litigation that has been plagued by unsupported and incorrect judicial decisions — all of which have served to deprive the Petitioner of valid civil causes of action and damages caused by the proven fraudulent conduct of the Respondent.

A. Proceedings in the District Court.

Utah Foam originally filed this action against Upjohn Company claiming damages for price discrimination, intentional fraud, negligent misrepresentation, breach of contract, and punitive damages. Utah Foam's damage claims arose when it discovered that during the period from 1978 through 1985, Upjohn Company had sold polymeric isocyanate, a primary chemical component of the rigid, spray polyurethane foam systems sold by Utah Foam, to competitors of Utah Foam at a much lower price than the prices given to Utah Foam. For many years, although Upjohn had knowledge otherwise, it repeatedly promised Utah Foam that it was receiving the best price of any systems house buying isocyanate from Upjohn. After nine years of litigation, the fraud, misrepresentation and punitive damages were tried before a jury, which jury found, by clear and convincing evidence, that Upjohn was liable on all of these claims. The evidence clearly presented at trial proved that Upjohn consistently gave excessive freight allowances, failed to maintain represented packaging allowances, provided numerous types of miscellaneous credits, and negotiated larger volume discounts with Utah Foam's competitors. It was proven that Utah Foam paid a higher price per pound for the isocyanate then its competitors paid. The jury, by special verdict, found that Upjohn committed intentional fraud and negligent misrepresentation, and that Utah Foam had suffered compensatory damages in the sum of $313,593. The

jury also found Upjohn liable for punitive damages in the sum of $5,500,000. However, the court in ruling on extensive post trial motions, remitted large portions of the jury verdict and only allowed Utah Foam a judgment in the amount of $303,573.11 for compensatory damages, and $607,142.22 in punitive damages. These damages are only a fraction of the damages to which Utah Foam would have been entitled had the court not made numerous erroneous rulings denying Utah Foam access to discoverable PAPI 135, PAPI 27, and CPR documents, dismissing Utah Foam's claims for price discrimination, and precluding Utah Foam's experts from testifying to the full measure of Utah Foam's damages. As an example of the prejudicial effect of these rulings, had the court allowed Utah Foam's expert to present his full opinion and report, Utah Foam's compensatory damages would have been $1,840,761, including lost profits and limited estimates on lost margins, but excluding interest calculations. Moreover, the court denied Utah Foam prejudgment interest. A copy of the final judgment of the district court is attached at Appendix D.

B. Proceedings in the Court of Appeals

Both parties to the district court action filed appeals to the United States Court of Appeals for the Tenth Circuit. The parties submitted extensive briefs and appendices to the Court of Appeals, and oral argument was heard on January 20, 1998. On September 4, 1998, the Court of Appeals entered its ruling affirming the decision of the district court. A copy of the September 4, 1998 opinion is attached at Appendix C. Due to numerous issues of fact and law that were blatantly ignored and misconstrued by the Court of Appeals, the Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc on September 18, 1998, fourteen days from the date of the judgment.

On October 14, 1998, the Court of Appeals issued an order denying the Petition for Rehearing on the grounds that the Petition was not filed timely. In addition, the Court of Appeals denied the rehearing en banc, stating that

> [t]he suggestion for rehearing en banc was transmitted to all of the judges of the court. . . . As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

A copy of the October 14, 1998 ruling is attached as Appendix A.

On October 27, 1998, the Petitioner filed an Objection to Denial of Rehearing and Request for Ruling, which objection was supported by conclusive evidence that the Petition for Rehearing was, in fact, filed timely, pursuant to the requirements of the federal rules. On November 25, 1998, the Court of Appeals filed an Order denying the Request for Ruling, stating that the Petitioner's Objection had been carefully considered. A copy of the November 25, 1998 Order is attached as Appendix B.

Even though the Court of Appeals entered its latest Order in the case on November 25, 1998, the Petitioner was not aware of the Order until December 11, 1998, when a clerk of the Court of Appeals informed counsel, via telephone, of the entry of the Order. In spite of multiple requests to the Court of Appeals, the Petitioner and counsel were not provided with a written copy of the November 25, 1998 Order until December 29, 1998, and two more copies of the Order on January 4, 1999. By the time the Petitioner was informed of the final order on the Petition for Rehearing, the ninety day period to appeal from the September 4, 1998 ruling had passed.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT MUST GRANT A WRIT CERTIORARI IN ORDER TO CORRECT THE COURT OF APPEALS' DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY REFUSING TO CONSIDER AND RULE ON THE MERITS OF A TIMELY PETITION FOR REHEARING.

The Petition for Rehearing was due to be filed on September 18, 1998. The Petition for Rehearing was in fact filed on September 18, 1998. Even still, the Court of Appeals ruled that the Petition for Rehearing was untimely. This Court must grant certiorari in this case in order to correct a situation where the actions of the Court of Appeals "ha[ve] so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rules of the Supreme Court, Rule 10(a). The United States Constitution guarantees that no person will be deprived of life, liberty or property without "due process of law." U.S. Const. amend. V. The Federal Rules of Appellate Procedure, along with the other rules enacted for litigation before the federal courts, exist to guarantee that a uniform and fair process is used to govern and administer the substantial life, liberty, and property rights and interests that are litigated and appealed in the federal court system. Moreover, the Federal Rules of Appellate Procedure, along with the other rules of the federal courts, establish the accepted and usual manner in which federal judicial proceedings are to be conducted. The facts of this case show that the Court of Appeals has ignored the applicable Rules of Appellate Procedure, and by doing so, has unacceptably refused to perform its judicial duty to fairly and fully consider the merits of the Petition for Rehearing.

Under the Federal Rules of Appellate Procedure, a party to an appeal my file a Petition for Rehearing within fourteen (14) days of the entry of judgment by the Court of Appeals. That Petition for Rehearing must be formatted, filed, and served in the manner in which appellate briefs are formatted, filed, and served. *See* Federal Rules of Appellate Procedure, Rules 40, 32, 31, 26, and 25. Rule 40 of the Federal Rules of Appellate Procedure specifically states that Petitions for Rehearing are to be served and filed in the manner prescribed "for the service and filing of briefs." *See* Federal Rules of Appellate Procedure, Rule 40(b). Similarly, the Rules very specifically state that "briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excluding special delivery, is utilized." *See* Federal Rules of Appellate Procedure, Rule 25(a). It is important to note that the published Rules of Procedure for the Tenth Circuit Court of Appeals do not modify the stated Federal Rules.

Following the entry of the Court of Appeals judgment on September 4, 1998, the Petition had fourteen days in which to file a Petition for Rehearing. That fourteen day period ran through September 18, 1998. As shown by affidavits from counsel and from the office staff member, who posted the Petition for Rehearing, attached to the Petitioner's Objection to Denial of Rehearing and Request for Ruling, dated October 27, 1998, the Petitioner did in fact file the Petition for Rehearing, as required by Rule 25(a), on September 18, 1998, when the Petition was mailed and postmarked, via first class U.S. Mail. A copy of this Objection and the supporting affidavits are attached hereto as Appendix E. Therefore, the Court of Appeals' ruling that the Petition was untimely was entirely incorrect. The court's refusal to consider the merits of the Petition is an egregious departure from the accepted and usual course of proceedings normally followed by the appellate judiciary.

Unfortunately, the Court of Appeals' disregard of the Rules, in stating that the Petition was untimely, is only a small part of the judicial confusion and carelessness apparent in this appeal. On October 27, 1998, the Petitioner filed an Objection to Denial of Rehearing and Request for Ruling, seeking a ruling on the merits of the Petition for Rehearing. At the time this objection was filed, there was more than ample time for the Court of Appeals to rule on the Objection and still leave time for the Petitioner to seek a writ of certiorari with this Court within ninety days of the original Court of Appeals judgment dated September 4, 1998. However, the Court of Appeals did not rule on the Objection until November 25, 1998, and the Petitioner was not apprised of the ruling until December 11, 1998 — after the ninety day period had expired. In addition, the Petitioner was only informed of the ruling after repeated telephone calls to the Court of Appeals to determine the status of the Objection. The Petitioner was not even provided with a copy of November 1998 ruling until December 29, 1998 — a mere two weeks from the deadline for seeking a writ of certiorari on the October 14, 1998 decision. Because of the Court of Appeals' delay and disregard for the appellate rules, the Petitioner may now be precluded from seeking further judicial review of the September 4, 1998 judgment.

Based on the foregoing, this Court should grant a writ of certiorari in order to correct the Court of Appeals' disregard for the appellate rules. Through the grant of certiorari, this Court can ultimately require that the Court of Appeals address the merits of the Petition for Rehearing in order that the Petitioner can, if necessary, seek appropriate further appellate review of the judgments entered by the district court and Court of Appeals.

II.

THIS COURT MUST GRANT A WRIT OF CERTIORARI IN ORDER TO PUT A STOP TO YEARS OF JUDICIAL ERROR AND BIAS THAT HAVE LEFT THE PETITIONER WITH ONLY A FRACTION OF ITS PROVEN DAMAGES.

This litigation was commenced nearly ten years ago. Originally, the Petitioner raised claims of price discrimination, breach of contract, intentional fraud, negligent fraud, and punitive damages. Early in the litigation, the district court relied on perjurious testimony from an Upjohn employee to wrongfully deny discovery and wrongfully dismiss the price discrimination claim. For many years the Petitioner provided the district court with overwhelming evidence that contradicted the perjured testimony, and the Petitioner repeatedly attempted to persuade the court that, based on this overwhelming evidence, the Petitioner should be allowed access to documents and records that would justify not only the reopening of the price discrimination claim, but also would show the full amount of damages suffered by the Petitioner. However, the district court stubbornly refused to consider this evidence, until such time that even the defendant had to stipulate that the documents the Petitioner had sought for years were relevant to the case. In spite of this stipulation, the district court required the parties to proceed to trial without the Petitioner being granted access to the vast majority of the relevant documents. At that trial, the jury awarded the Petitioner the full amount of damages presented (without access to documents needed to prove full damages) on the issue of fraud and awarded punitive damages in the amount of $5.5 million dollars.

In an affront to the jury, the district court ordered a limited and minor remittitur of the compensatory damages and a

substantial remittitur of the punitive damages. The court also refused to grant prejudgment interest to the Petitioner. Consequently, the jury's verdict was reduced to less than one million dollars.

The Petitioner appealed numerous issues in order to gain access to relevant damage documents, to reopen the price discrimination case, to present full calculation of damages not before the jury, and to obtain prejudgment interest. These issues, fully supported by law and fact, were presented to the Court of Appeals. Unfortunately, the Court of Appeals ignored the law and facts set forth in the briefs, and instead relied on misinterpretations of the facts to affirm the district court rulings. The actions of the Court of Appeals in refusing to properly rule on the merits of the Petition for Rehearing and refusing to provide timely notice of its rulings further accentuates this long history of judicial error that has unfairly deprived the Petitioner of recoverable damages.

It is ironic that at this time of heightened national concern over the effects of perjured testimony, the Court of Appeals would disregard appellate rules of procedure in order to avoid taking appropriate action to undo years of erroneous judicial rulings that were based solely on proven perjurious testimony of an Upjohn executive. It is clear that the Petitioner is not being granted the equal justice, equal reasoning, equal attention, and equal impartiality that should be given to all civil litigants. The result of this unequal consideration and justice is a loss of judicial integrity that manifests itself in the Petitioner being prevented from recovering the bulk and majority of its valid, provable damage claims.

By granting a writ of certiorari in this matter, this Court can take action to stop the long string of judicial error and to guarantee that the Petitioner has every appropriate avenue for pursuing its legal claims.

CONCLUSION

Based on the foregoing, this Court should grant the Petitioner's request for certiorari. By doing so, the Court can ensure that the Petitioner is accorded all avenues of legal recourse under which the Petitioner can seek to correct the many years of judicial confusion and error that have plagued and continue to plague this litigation. Accordingly, the Petitioner respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

C. RICHARD HENRIKSEN, JR.
Counsel of Record
RALPH W. CURTIS
HENRIKSEN & HENRIKSEN, P.C.
Attorneys for Petitioner
320 South 500 East
Salt Lake City, Utah 84102
(801) 521-4145

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 14, 1998

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-4007
97-4008

UTAH FOAM PRODUCTS CO., a Utah corporation,

Plaintiff - Appellant-Cross-Appellee,

v.

THE UPJOHN COMPANY, a Delaware corporation,

Defendant - Appellee-Cross-Appellant.

ORDER
Filed October 14, 1998

Before **TACHA, BRORBY**, and **EBEL**, Circuit Judges.

Utah Foam Products' petition for rehearing is denied as untimely.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Appendix A

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ M. Talamas
Deputy Clerk

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING OBJECTION TO DENIAL OF REHEARING DATED AND FILED NOVEMBER 25, 1998

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 97-4007 and 97-4008

UTAH FOAM PRODUCTS CO., a Utah Corporation,

Plaintiff - Appellant,

v.

THE UPJOHN COMPANY, a Delaware Corporation,

Defendant - Appellee.

ORDER
Filed November 25, 1998

Before **TACHA**, **BRORBY**, and **EBEL**, Circuit Judges.

This matter is before the court on appellant/cross-appellee Utah Foam Products Co.'s Objection to Denial of Rehearing and Request for Ruling. After careful consideration of the objection, the request is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ Jeanne E. Herrick-Stare
Jeanne E. Herrick-Stare
Counsel to the Clerk/Deputy Clerk

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED SEPTEMBER 4, 1998

UTAH FOAM PRODUCTS CO., a Utah corporation, Plaintiff-Appellant-Cross-Appellee,

v.

THE UPJOHN COMPANY, a Delaware corporation, Defendant-Appellee-CrossAppellant.

Nos. 97-4007, 97-4008.

United States Court of Appeals,
Tenth Circuit.

Sept. 4, 1998.

* * *

Before TACHA, BRORBY and EBEL, Circuit Judges.

EBEL, Circuit Judge.

Plaintiff-Appellant Utah Foam Products Co. ("Utah Foam") appeals from a jury verdict and order of damages in its favor on its fraud and negligent misrepresentation claims against Defendant-Appellee, The Upjohn Company ("Upjohn"). Utah Foam claims that the district court erred in making certain evidentiary rulings, in dismissing Utah Foam's claim under the Utah Unfair Trade Practices Act, and in denying Utah Foam's

request for prejudgment interest on damages awarded. Utah Foam also claims that the district court judge erred in refusing to recuse himself from the case. Upjohn brings a cross-appeal, claiming that the district court erred in refusing to grant judgment as a matter of law in favor of Upjohn on Utah Foam's fraud and negligent misrepresentation claims. We affirm the jury's verdict and all of the district court's rulings.

Background

This lengthy litigation grew out of a dispute about the price Upjohn charged Utah Foam for polymeric isocyanate (trade name "PAPI"), a chemical made by Upjohn and used by Utah Foam in making rigid sprayable polyurethane foam, an insulating material. From 1978 until 1986, Upjohn contracted to supply Utah Foam with PAPI 27, one of the types of isocyanate made by Upjohn. According to Utah Foam, Upjohn fraudulently and negligently misrepresented to Utah Foam that Utah Foam would always be the recipient of Upjohn's "best price" for PAPI. *See Utah Foam Products Co. v. The Upjohn Company*, 930 F.Supp. 513, 516 (D.Utah 1996). Utah Foam discovered this alleged fraud and misrepresentation when circumstances forced Utah Foam to buy PAPI 27 from one of Utah Foam's competitors, and found that the competitor was able to offer the product to Utah Foam at a lower price than that charged by Upjohn.

In July, 1987, Utah Foam filed suit against Upjohn, claiming that Upjohn violated Utah's Unfair Practices Act, breached the contract, and committed fraud and negligent misrepresentation. Utah Foam requested compensatory and punitive damages. During a drawn-out period of pretrial litigation, the district court repeatedly ruled that Upjohn's

records regarding the sales of PAPI 135 would not be subject to discovery in this case, because PAPI 135 was not of like grade and quality to PAPI 27, the subject of Utah Foam's Unfair Practices claim.[1] The district court also denied Utah Foam's motions to compel production of sales records of CPR, a wholly-owned subsidiary of Upjohn, on the basis that all deliveries of PAPI from Upjohn to CPR qualified as intra-company transfers, and not sales, and thus they were irrelevant to Utah Foam's claims. On January 12, 1994, the district court granted summary judgment to Upjohn on Utah Foam's state price discrimination claim. The district court dismissed Utah Foam's breach of contract claim on October 18, 1994. On December 18, 1995, the district court ruled that Utah Foam's experts' testimony as to the calculation of damages would be limited to proving lost margins, based upon differences in the net price paid for PAPI, and not lost sales. On January 26, 1996, Utah Foam filed a motion for recusal, on the ground that the district court judge had exhibited bias against Utah Foam and favoritism for one of Upjohn's counsel. After a hearing, the district court denied the motion.

Utah Foam's fraud and negligent misrepresentation claims went to trial before a jury on February 20, 1996. *See Utah Foam*, 930 F.Supp. at 515. The jury found that Upjohn had made fraudulent and negligent misrepresentations to Utah Foam

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1. Shortly before trial, Utah Foam successfully argued to the district court that Upjohn's PAPI 135 records were relevant to its fraud claim. However, in light of Utah Foam's unjustified tardiness in making this argument for the first time so close to the scheduled start of trial, the court limited discovery of those records to those already prepared by Upjohn (years 1983-1985). The court refused to order production of PAPI 135 records from earlier years, on the grounds that so doing would cause real prejudice to Upjohn.

regarding the price of PAPI, and awarded Utah Foam $313,593 in compensatory damages plus $5.5 million in punitive damages. *See id.* at 516. Upjohn moved under Federal Rule of Civil Procedure 50(b) to vacate or adjust the award of compensatory damages on Utah Foam's fraud and negligent misrepresentation claims. *See id.* at 518. The court refused to vacate the award, but reduced the amount of compensatory damages to $303,573.11. *See id.* at 518-22, 532. The district court also denied Upjohn's Rule 50(b) motion to vacate the award of punitive damages, but granted its motion for remittitur, reducing the punitive damages award to $607,142.22. *See id.* at 523-32. In addition, the district court denied Utah Foam's motion for prejudgment interest. *See id.* at 522-23. The district court then issued an order offering Utah Foam the option of accepting remittitur or undergoing a new trial on all issues. *See Utah Foam Prods. Co. v. The Upjohn Co.*, 930 F.Supp. 513, 519-22 (D.Utah 1996) (unpublished order). Utah Foam accepted remittitur.

Utah Foam now appeals the district court's evidentiary rulings restricting the discovery of Upjohn's PAPI 135 sales records, prohibiting discovery of CPR's records, and limiting Utah Foam's experts' testimony as to estimated losses and damages; the district court's denial of prejudgment interest; the district court's dismissal of Utah Foam's Utah Unfair Practices claim; and the district court's denial of Utah Foam's motion to recuse. Upjohn cross-appeals the district court's refusal to grant Upjohn's Rule 50(b) motion to vacate the jury's finding of liability for fraud and negligent misrepresentation.

Appendix C

I. Acceptance of remittitur

In *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 97 S.Ct. 835, 51 L.Ed.2d 112 (1977) (per curiam), the Supreme Court reiterated "the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." The policy underlying this rule sounds in contract law. By accepting remittitur of damages in lieu of a new trial, the plaintiff has accepted the benefit of not having to undergo the rigors, risks, and costs of a new trial in exchange for an agreement not to challenge the damages award or otherwise appeal any matter pertaining to the issues covered by the remittitur offer. However, a party who has accepted remittitur of damages on one cause of action may still appeal issues related to other causes of action not subject to the remittitur order. *See Denholm v. Houghton Mifflin Co.*, 912 F.2d 357, 359 & n. 2 (9th Cir.1990) (listing cases); *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 626-27 (4th Cir.1977); Bruce I. McDaniel, Annotation, *Plaintiff's right to appeal adverse judgment on one cause of action as affected by acceptance of remittitur on another cause of action*, 41 A.L.R. Fed. 856, 857, 1979 WL 52089 (1979).

In *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856-57 (10th Cir.1986), the district court gave the plaintiffs a choice between remittitur of the jury's punitive damages award or a new trial on all issues. The plaintiffs chose remittitur. When the plaintiffs attempted to appeal the district court's denial of attorney's fees and prejudgment interest on the compensatory damages, we held that they were barred from doing so under *Donovan*. *See id.* In short, the well-established rule is that acceptance of remittitur of damages effectively waives the right to appeal any issue pertaining to the causes of action covered by the

remittitur offer. *See Denholm*, 912 F.2d at 360-61 (acceptance of remittitur of compensatory damages bars appeal of pretrial orders excluding evidence relevant to proving those damages). Moreover, acceptance of remittitur of either compensatory or punitive damages bars appeal of issues related to both. *See Alley*, 785 F.2d at 857 ("[T]he district court's remittitur embraced all issues considered in the case and . . . the Alleys' acceptance of the remittited judgment waives their right to appeal these issues."); *see also Lanier v. Sallas*, 777 F.2d 321, 322 (5th Cir.1985) (because punitive damages and compensatory damages based upon same cause of action are "inextricably intertwined," acceptance of remittitur of compensatory damages barred appeal of district court's refusal to submit issue of punitive damages to the jury).

Here, Utah Foam does not dispute that it had the choice of accepting either remittitur of its damages based upon its fraud and negligent misrepresentation claims or face a new trial on those claims. Nor does Utah Foam attack the district court's decision to impose remittitur, but rather seeks to appeal the court's rulings on issues directly related to Utah Foam's claims at trial, namely, the district court's denial of pre-judgment interest, its rulings limiting the scope of discovery of Upjohn's PAPI records, its ruling denying discovery of CPR's PAPI documents, and its limitation of Utah Foam's experts' testimony as to the calculation of damages. Because Utah Foam accepted remittitur of damages on its fraud and negligent misrepresentation claims and thereby avoided a complete retrial of those issues, *Alley* bars Utah Foam's appeal of all issues which relate to those claims. We find that Utah Foam's acceptance of remittitur waived the right to appeal these issues and decline to consider them now.

Appendix C

II. Utah Unfair Practices Act claim

Because the Utah Unfair Practices Act claim did not go before the jury in this case and the district court did not order a retrial of that claim in the event Utah Foam did not accept the remittitur on the fraud and negligent misrepresentation claims, Utah Foam did not waive the right to appeal the dismissal by summary judgment of the Unfair Practices Act claim. *See Call Carl,* 554 F.2d at 626-27 (acceptance of remittitur on fraud and deceit count does not preclude appeal of directed verdict on Sherman Act count). We review a grant of summary judgment de novo, applying the same standard as the district court. *See Sports Racing Servs., Inc. v. Sports Car Club of America, Inc.,* 131 F.3d 874, 882 (10th Cir.1997). After reviewing the record on appeal, we conclude that the district court did not err in granting Upjohn's motion for summary judgment on Utah Foam's price discrimination claim.

Discrimination in pricing is illegal "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." Utah Code Ann. § 13-5-3(1)(a) (1996); *see Burt v. Woolsulate, Inc.,* 106 Utah 156, 146 P.2d 203, 205 (1944) ("It is not every discrimination in price that is outlawed by the Utah Act, but only those which tend to substantially lessen competition or tend to create a monopoly."). The party alleging illegal pricing discrimination bears the burden of showing that the illegal conduct may have substantially impacted competition. *See Gold Strike Stamp Co. v. Christensen,* 436 F.2d 791, 796-97 (10th Cir.1970); *Burt,* 146 P.2d at 205. Under Utah law, the term "commerce" means "intrastate commerce in the state of Utah." Utah Code Ann. § 13-5-5 (1996). It is not clear that the commerce affected here was intrastate commerce. *See Belliston*

v. Texaco, Inc., 521 P.2d 379, 381-82 (Utah 1974). However, even if the affected commerce was intrastate, we agree with the district court that it was not substantially lessened by the defendants' conduct, and accordingly we affirm.

At summary judgment, the district court held that Utah Foam could only prove discriminatory pricing damages totaling $18,981 and could not prove injury to competition. Thus, the district court dismissed the claim because Utah Foam had failed to show that Upjohn's price discrimination substantially impacted competition in the Utah insulating foam market, as required by the statute. We have carefully reviewed the district court's order and the record, applying the same standard used by the district court. We agree with the analysis and findings of the district court. Accordingly, we affirm the district court's conclusion that the defendant was entitled to summary judgment because its acts of discriminatory pricing did not have, and were not likely to have, the effect of substantially lessening competition or a tendency to create a monopoly in any line of commerce.[2]

III. Evidentiary issues

Utah Foam asserts that the district court erred in not allowing it to discover Upjohn's PAPI 135 sales records and records of transfers of PAPI from Upjohn to CPR, and claims that if it were allowed to present this evidence, its anticompetitive damages would be shown to have had more than a de minimus effect on commerce in Utah. We review the

2. We disagree with Utah Foam's argument that the grant of summary judgment against it on its state discriminatory pricing claim is inconsistent with the jury verdict holding Upjohn liable for fraud and negligent misrepresentation.

district court's decision to exclude evidence at the summary judgment stage for abuse of discretion. *See Sports Car Racing Servs.*, 131 F.3d at 894.

Under the Utah price discrimination statute, comparisons of allegedly similar discriminatory sales must be made among sales of products of "like grade and quality." Utah Code Ann. § 13-5-3(1)(a) (1996). The plaintiff bears the burden of proving that the products in question were of like grade and quality. *See Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 1989-1 Trade Cas. (CCH) ¶68,583, at 61,103 (M.D.N.C. 1988).[3] "In fashioning a 'like grade and quality' standard, courts have generally emphasized the presence, or absence, [of] significant physical differences between products and the effect of those differences upon consumer preferences." *Id.* (listing cases). Also relevant to the inquiry is whether there are "differences in the way in which a customer can or must use the product." J.P. Ludington, Annotation, *What are "commodities" and "commodities of like grade and quality," within provision of Robinson-Patman Act prohibiting price discrimination between different purchasers of commodities of like grade and quality-federal cases*, 16 L.Ed.2d 1097, 1101 (1967). Thus, "bona fide physical differences affecting consumer use or marketability should be sufficient to cause products not to be of like grade and quality." ABA Section of Antitrust Law, *Antitrust Law Developments* 444-45 (4th ed.1997).

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3. Because we find no controlling Utah law construing the phrase "like grade and quality," we look to federal law for guidance. *See Belliston v. Texaco, Inc.*, 521 P.2d 379, 380 (Utah 1974) ("Except for the jurisdictional requirements, the language of Section 3(a) of the Unfair Practices Act is substantially similar to the provisions of Section 13(a) of the Robinson-Patman Act."); *cf. Evans v. State*, 963 P.2d 177, __, 1998 WL 327681, at *3 (Utah June 23, 1998) (citing Utah Code Ann. § 76-10-926).

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Although Utah Foam asserts that PAPI 27 and PAPI 135 are very similar in structure and may be used interchangeably, it is undisputed that PAPI 27 and PAPI 135 differ, mainly in terms of viscosity and reactivity, particularly in colder situations. As a result, some consumers prefer one over the other; Utah Foam's own president admitted in his affidavit and during depositions that the company had a clear preference for PAPI 27 over PAPI 135 because of PAPI 27's superior performance qualities at high altitudes. Thus, the district court did not err in holding that, for the purposes of Utah Foam's price discrimination claim, PAPI 135 was not a product of "like grade and quality" to PAPI 27 and in refusing to order discovery of Upjohn's PAPI 135 sales records for the purposes of Utah Foam's price discrimination claim.

Utah Foam also argues that the court erred in not allowing it to discover CPR's PAPI records. According to Utah Foam, CPR, a producer of foam insulation systems, was both a competitor of Utah Foam in the Utah market and an economic entity independent from Upjohn. Because the district court held CPR to be economically indivisible from Upjohn, and because there was no evidence offered that Upjohn used CPR to sell raw PAPI 27 to Utah Foam's competitors at lower prices than those available to Utah Foam, the court held that Upjohn's transfers of PAPI to CPR were not within the purview of the Utah price discrimination statute.

It is well established that a defendant's transfers of product to a wholly owned subsidiary is an intra-corporate transfer and not a "sale" for purposes of a price discrimination claim. *See City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 277-79 (8th Cir.1988); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 221 (6th Cir.1985);

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Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962, 966 (5th Cir.1979). This is because the wholly owned subsidiary and the parent company are seen as a single economic actor. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770-71, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (In the context of Section 1 of the Sherman Act, "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder.")

Utah Foam claims that CPR was in fact an "independent subsidiary" of Upjohn, and therefore transfers of PAPI 27 from Upjohn to CPR should be treated as "sales" under the price discrimination statute. Utah Foam points to the following factors, all based upon the testimony of Upjohn's Keith Edmonson, Vice President and General Manager of Upjohn's Chemical Division, as evidence that CPR was sufficiently independent from Upjohn so as to render the two separate economic entities:

> (1) The title of goods passed to CPR when the product was shipped; (2) CPR recommended prices of the PAPI and systems it sold, which prices were never overruled by Upjohn; (3) Upjohn's divisions, like Polymer and CPR, were allowed to set their own prices; (4) CPR had its own payroll department and personnel department; (5) CPR made decisions as to whom and to where it would sell its products;

> (6) CPR could reject the product it received from Upjohn based on its quality; and (7) CPR had its own accounting department and separate checking accounts.

(*See* Aplt. Br. at 26 (record citations omitted).) None of this evidence tends to show that CPR was anything but an individual corporate "horse" pulling together with its sister divisions for the benefit of their common "driver," namely, Upjohn. *See Copperweld*, 467 U.S. at 771, 104 S.Ct. 2731. For its part, Upjohn points to evidence that all of CPR's essential activities were overseen by Mr. Edmondson, who wielded final executive decision-making and accounting power over CPR. Simply because Upjohn granted its CPR Division some measure of free reign over its activities does not diminish the fact that the evidence shows that CPR operated solely for the benefit and under the ultimate control of Upjohn. We conclude that the district court did not abuse its discretion in holding that all transfers of PAPI 27 from Upjohn's Chemicals Division to CPR were intra-company transfers and not "sales" under the Utah price discrimination statute.

In the alternative, Utah Foam claims that even if Upjohn and CPR were a single economic entity, we should still find CPR's sales records to be discoverable in order to determine whether CPR sold PAPI 27 to Utah Foam's competitors, in which case CPR's sales could be attributed to its parent, Upjohn. However, the record shows that CPR sold complete foam spray systems, and not raw PAPI 27. Therefore, the district court did not abuse its discretion in deeming CPR's sales records irrelevant to this lawsuit.

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IV. Recusal

Regarding recusal, Utah Foam merely argues that if we remand the case we should send it back to a different judge on the ground that Judge Greene erred in refusing Utah Foam's request that he recuse himself. Because we have identified no reason for remanding this case, we consider this argument moot.[4]

V. Upjohn's Cross-Appeal

Upjohn appeals the district court's refusal to vacate the jury verdict finding it liable to Utah Foam for damages caused by its negligent misrepresentation and fraud. We examine the negligent misrepresentation claim first.

A. Negligent Misrepresentation

Upjohn claims that under the negligent misrepresentation theory of liability Utah Foam can only recover for the difference between the price it paid for the product and the fair market value of the product. Upjohn then asserts that because Utah Foam did not and cannot prove the fair market value of PAPI during the times in question, it must lose on this claim as a matter of law. We disagree.

Here, Upjohn does not dispute that the elements of negligent misrepresentation were proved at trial. Instead, Upjohn argues that the *damages* proved by Utah Foam are inappropriate for this claim, namely, that Utah Foam only

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4. Even if we were to treat this claim as an independent argument for reversal, we would find no error.

proved "benefit of the bargain" loss as opposed to pecuniary loss based on the difference between the price it paid for PAPI and the fair market price.

Under Utah law, the measure of damages for negligent misrepresentation includes the amount of money necessary to compensate the plaintiff for its detrimental reliance. *See Forsberg v. Burningham & Kimball,* 892 P.2d 23, 27 (Utah Ct.App.1995). Such damages include " 'the difference between the value of what [plaintiff] has received in the transaction and its purchase price or other value given.' " *Id.* (quoting Restatement (Second) of Torts § 552(B)(1)(a) (1976)).

Here, the district court did just that. It held that the "market price" for this case was not the price of PAPI on the open market but rather the price paid by Utah Foam's competitors. *See Utah Foam,* 930 F.Supp. at 522. This approach to calculating the difference between the value Utah Foam thought it was getting and the actual value of the PAPI comports with the law in Utah. Thus, we affirm the jury verdict against Upjohn for negligent misrepresentation.

B. Fraud

At trial, the jury found Utah Foam's actual damages caused by Upjohn's negligent misrepresentation and fraud to be identical: $313,593. Utah Foam was awarded this single amount, minus post-trial reductions by the district court. Because on appeal Upjohn does not challenge the propriety of the negligent misrepresentation verdict in Utah Foam's favor (other than the damages calculation), because the jury found Utah Foam's damages from the two causes of actions to be singular, and because we affirm the negligent misrepresentation

damages award, we need not address Upjohn's argument that the district court erred in refusing to grant its motion to vacate the jury verdict as to Utah Foam's fraud claim.

Conclusion

For the reasons stated above, the judgment below is AFFIRMED.

APPENDIX D — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AND FILED JUNE 27, 1996

UTAH FOAM PRODUCTS CO., Plaintiff,

v.

The UPJOHN COMPANY, Defendant.

Civil No. 87-C-955G.

United States District Court,
D. Utah,
Central Division.

June 27, 1996.

* * *

MEMORANDUM DECISION
AND ORDER

J. THOMAS GREENE, District Judge.

This matter is before the court on Upjohn's Motion for Judgment as a Matter of Law, or in the alternative New Trial or Remittitur, for both compensatory and punitive damages, after trial to a jury February 20 through March 4, 1996. Also before the court is Upjohn's Objection to an award of prejudgment interest and the postjudgment interest rate as set forth in Utah Foam's proposed form of judgment. The jury determined in a Special Verdict that Upjohn, when it was a manufacturer and seller of isocyanate during the time period

in question, made both fraudulent and negligent misrepresentations to Utah Foam, a purchaser of isocyanate. On March 1, 1996, the jury rendered a verdict in favor of Utah Foam in the amount of $313,593 in compensatory damages. On March 4, 1995 the jury returned a verdict of $5.5 million in punitive damages.

Plaintiff is represented by C. Richard Henriksen and Ralph Curtis. Defendant is represented by Stephen B. Nebeker, Jonathon Dibble and Rick Hoggard. The parties have filed extensive legal memorandums, argument was presented at a hearing on April 22, 1996, and the matter was taken under advisement. Thereafter, both parties submitted additional legal analysis relative to punitive damages in view of the Supreme Court's decision in *BMW of North America, Inc. v. Gore*, __ U.S. __, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), which was handed down after this case was argued.

STANDARDS

Motion for Judgment as a Matter of Law

The standard for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure is rigorous. Judgment as a matter of law is proper "only when the evidence so strongly supports an issue that reasonable minds could not differ." *Delano v. Kitch*, 663 F.2d 990, 1002 (10th Cir.1981). Courts must view the evidence in the light most favorable to the nonmoving party, without weighing the evidence, passing on the credibility of witnesses, or substituting the court's judgment for that of the jury. *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir.1990), *cert. denied*, 500 U.S. 905, 111 S.Ct. 1685, 114 L.Ed.2d 80 (1991); *Ryder v. City of Topeka*, 814

F.2d 1412, 1418 (10th Cir.1987); *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 613 (10th Cir.1984). If conflicting material evidence exists, or if the evidence is insufficient to warrant a "one-way conclusion," judgment as a matter of law is inappropriate. *Zuchel v. City and County of Denver, Colorado*, 997 F.2d 730, 734 (10th Cir.1993). Accordingly, as to defendant's motion for judgment as a matter of law, this court views the evidence in this case in favor of Utah Foam and extends to it the benefit of all reasonable inferences. *Finley v. U.S.*, 82 F.3d 966 (10th Cir.1996).

Motion for New Trial

The party seeking a new trial must demonstrate that the verdict is "not based on substantial evidence." *White v. Conoco, Inc.*, 710 F.2d 1442 (10th Cir.1983). When the verdict is clearly and decidedly against the weight of the evidence, a new trial is proper. *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir.1995), *cert. denied*, __ U.S. __, 116 S.Ct. 1017, 134 L.Ed.2d 97; *Holmes v. Wack*, 464 F.2d 86, 88-89 (10th Cir.1972); *May v. Interstate Moving & Storage*, 739 F.2d 521, 525 (10th Cir.1984). This generally presents a question of fact to be determined by the trial court. *Brown*, 736 F.2d at 616; *Richardson v. City of Albuquerque*, 857 F.2d 727, 730 (10th Cir.1988); *see* 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 2806.

Remittitur

When confronted with the contention that compensatory or punitive damages are excessive, the trial court may order a remittitur. *Klein v. Grynberg*, 44 F.3d 1497, 1507 (10th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 58, 133 L.Ed.2d 22 (1995).

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Whether a punitive damage award is excessive and requires remittitur implicates state law in diversity cases as well as federal constitutional law. *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991) ("*Crookston I*"); *Crookston v. Fire Insurance Exchange*, 860 P.2d 937 (Utah 1993) ("*Crookston II*"); *BMW*, __ U.S. __, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

FACTUAL BACKGROUND

Plaintiff presented evidence to the jury of damages resulting from Upjohn's allegedly fraudulent and negligent misrepresentations that Utah Foam would receive the "best" price in sales of isocyanate by Upjohn to Utah Foam. Plaintiff's experts compared transactions between Upjohn and Utah Foam with transactions between Upjohn and competitors of Utah Foam in order to establish damages which resulted from price differentials or "lost margins." To determine the comparative price, plaintiff's experts identified invoices and other documents and opined that adjustments which were granted by Upjohn to certain competitors of Utah foam for such things as freight allowances and packaging differentials resulted in price advantages to such competitors to the detriment of Utah Foam. The experts used their own judgment to determine (1) the time frame in which to compare invoices, (2) how to use the invoices, (3) how to arrive at an appropriate freight allowance, (4) how to calculate and compare packaging differentials, and (5) how to calculate and quantify other special adjustments. In doing so, Charles Peterson and Kenneth Brown, plaintiff's experts, made different judgment calls and used different approaches in calculating damages. For instance, (1) Peterson generally used a 30 day time frame while Brown made comparisons within a 60 to 90 day time frame; (2) Peterson generally made

comparisons using single invoices, although on three comparisons he averaged multiple invoices and credits; Brown did not average any invoices; (3) Brown computed average freight allowances to competitors of Utah Foam in some instances and in other instances used only actual freight allowances; Peterson used the actual freight allowance given on the invoice, except for three comparisons in which he utilized a weighted average; (4) Peterson used Utah Foam's contract price list in order to establish the price differential in packaging costs between Utah foam and its competitors, except that when Utah Foam's price list was unavailable he used Upjohn's general price list; Brown used Upjohn's general price list for all transactions except that for certain transactions closer in time he used Utah Foam's contract price list. Both declined to use the Upjohn marketing price book. Brown and Peterson differed on 24 of the 49 packaging differentials. In addition, (5) both exercised judgment in opining that certain special situations were intended and actually resulted in price reductions to competitors. This includes the granting of credits by Upjohn for use of out-of-spec material, testing the product, settlement of a damage claim, and staggered price increases.

It was apparent that plaintiff's experts were unable to arrive at a precise damage figure concerning "lost margins" in pretrial proceedings or at trial. Using 53 comparisons in his report submitted before trial, Peterson calculated plaintiff's lost margin loss at $329,846. He estimated additional damages of $89,720 for 1981, 1982, and 1985, years where comparable invoices were not available. Peterson's total lost margins damage figure was $419,566. Brown prepared an early 1995 report in which he calculated plaintiff's lost margin loss at $336,525. He estimated additional damages at 176,675, for a total lost margins figure of $513,200. Brown and Peterson had different figures on at least 22 of the 53 comparisons.

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After a pre-trial court ruling,[1] Peterson revised his report to include 62 comparisons which resulted in $440,017 in lost margin damages. He estimated additional lost margins for fiscal years 1979-1982 of $443,986. Also, Peterson calculated "lost sales" for fiscal years 1983-1985. Brown arrived at a new lost margins figure of $450,358 with the 62 comparisons. He estimated additional damages of $150,119, but did not calculate lost sales. Brown and Peterson differed in 33 of the 62 comparisons.

The court rejected the "estimated" and the newly proffered "lost sales" figures presented on the eve of trial, and plaintiff withdrew three comparisons. The experts then revised their calculations as to the remaining 59 comparisons: Peterson's lost margins figure increased to $447,515 (from $440,017 on 62 transactions) and Brown's figure decreased to $423,332 (from $450,358 on 62 transactions). Brown and Peterson still arrived at different figures on 20 of the 59 comparisons.

Testimony at trial concerning freight allowances was confusing and contradictory. Bruce Wilson, president of Utah Foam, testified that he understood that Upjohn would always grant four cents per pound freight allowance to customers who picked up the product at the factory outlet.[2] Upjohn presented

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1. In November 1995 the court ordered production of records in the possession of Upjohn relating to its Papi 135 product during 1983 to 1985 for use in comparative sales analysis concerning the Upjohn Papi 27 product.

2. Mr. Wilson's testimony was as follows:

> Q: And was there an instance that occurred where you actually had some material picked up or delivered a short distance from the Upjohn plant?

(Cont'd)

evidence that it based freight allowances on the published tariffs.[3] A competitor of Utah Foam testified that Upjohn would allow freight costs of at least $1.00 per mile.[4] Based upon that

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(Cont'd)

A: Yes.

Q: All right. And what was the credit that was issued?

A: Four cents a pound.

Q: What were you told about that four cents a pound?

A: That that was the standard freight allowance anywhere in the continental 48.

2 Tr. (Wilson) 59.

3. Charlotte Jane Guerrero, a rate analyst with Upjohn from 1978 to 1985, testified as follows:

A: Our freight rates were based on published common carrier tariffs which had commodity freight rates in those tariffs. And the SPL in this case stood for synthetic plastic liquid which was a commodity in these particular tariffs.

Q: So tariffs were different for different commodities?

A: Yes. The tariffs were different for the tank truck or tank wagon shipments, and they were different tariffs for the tank car shipments, package goods.

7 Tr. (Guerrero) 105.

4. Gale Vosburg, former president of Chemetics, testified that "the cost to [his] company in picking up the material down in Houston and bringing it up to Los Angeles," a 1,541 mile trip, would be about $1,600, or roughly $1 per mile. 3 Tr. (Vosburg) 25.

evidence during trial, the court removed from consideration by the jury $133,921 in the calculations of defendant's experts.[5]

From the aforesaid various and conflicting presentations of evidence, the jury apparently chose Peterson's calculations, based at least in part on an exhibit presented after his testimony was completed which the parties stipulated he would have identified as his work product if he had been called to further testify. That exhibit purported to spread the losses he had calculated into yearly time frames.

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5. The court instructed the jury that determination of the amount of freight allowance relative to the transactions in question was in dispute:

> There has been evidence that Mr. Wilson of Utah Foam was told that freight allowances to "will call" customers were equal to 4 cents per pound, regardless of destination within the continental United States. Other evidence was to the effect that freight allowances could be approximated by mileage at approximately one dollar per mile. Utah Foam claims that freight allowance should be measured by the cost to the customer to do his own shipping. Upjohn claims that freight allowances were granted on the basis of what it would cost Upjohn to ship, measured by published tariff rates. The court has determined as a matter of law that there should be no reduction in the price calculations to customers for freight allowances equal to or less than 4 cents per pound. The court also has determined that the total of all freight allowances, which should not in any event be regarded as a reduction in price, was $133,921. The jury is free to determine whether or not freight allowances which may be found to exceed that amount should be regarded as a reduction in the price of isocyanate which Upjohn sold to competitors of Utah Foam.

Jury Instruction No. 38.

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It was apparent from all of the evidence at trial that the calculation of damages and the spreading of such into time frames required determination from disputed and conflicting evidence. The damages claimed could not be calculated with mathematical accuracy. The amount of damages was uncertain and speculative and could not be known until such was fixed at trial by the jury.

I. *COMPENSATORY DAMAGES*

Upjohn moves to vacate or adjust the jury's award of $313,593 in compensatory damages pursuant to Rule 50(b) Fed.R.Civ.P. Upjohn claims that there is no evidence upon which a reasonable jury could have found (1) that Upjohn intended to defraud Utah Foam; (2) that Utah Foam reasonably relied on the alleged fraudulent or negligent misrepresentations; (3) that Upjohn negligently breached any industry standard of care; and (4) that Utah Foam sustained any compensable damages on its negligent misrepresentation claim. These matters will be discussed seriatim.

A. *Intention of Upjohn Concerning Fraudulent Misrepresentations*

(1) In General

Upjohn submits that undisputed evidence was presented that it believed its representations to plaintiff about "best price" were true based on *"net delivered price" (invoice price)*, and that Utah Foam consistently received the lowest price of any "systems house" customer. Upjohn insists that the manner in which it calculated price was reasonable and consistent with

good faith, and that as a matter of law the verdict based upon a finding of fraud should be overturned.[6]

Utah Foam presented evidence that as to certain transactions the *actual effective price* given to competitors was lower than the "best price." The resulting price differentials or "lost margins" were not based upon invoice prices but rather upon freight allowances, packaging cost differentials, volume rebates, credit terms, and to some extent special discounts based upon credits given for testing the product, non-uniform or "staggered" dates when price increases became effective, discounts for purchase of usable "out-of-spec" product, and a damage claim payment.

Upon review, this court determines that the evidence at trial was sufficient under a clear and convincing standard for a jury to have determined that Upjohn acted with intent to defraud Utah Foam by making misrepresentations on which Utah Foam relied as to certain transactions presented to the jury. Accordingly, the court denies Upjohn's motion for judgment as a matter of law because the evidence was not so strong on the issue of Upjohn's fraudulent intent that reasonable minds could not differ.

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6. The following elements are required under Utah law to establish fraud: (1) the defendant made a false or misleading statement, (2) and either knew the statement was false or misleading or made it with reckless disregard for its truth or falsity, (3) the statement was of material fact, (4) the defendant made the statement with the intent that plaintiff rely on the false or misleading representation, (5) plaintiff reasonably relied on the false or misleading representation, and (6) plaintiff suffered damages as a result of relying on the false or misleading representation. *Pace v. Parrish*, 122 Utah 141, 247 P.2d 273, 274-75 (1952); *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980); *Taylor v. Gasor, Inc.*, 607 P.2d 293, 294 (Utah 1980).

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(2) Special Credits Given to Competitors of Utah Foam

Upjohn claims in the alternative that compensatory damages for fraudulent misrepresentation should be reduced because a reasonable jury could not have found that Upjohn intended to defraud Utah Foam as to particular transactions where credits were allowed to competitors. In this regard, Upjohn claims that "special credits and situations" granted to competitors of Utah Foam do not show any intent to defraud and should be disallowed as a matter of law. Utah Foam claims that these transactions amounted to "discounts and preferential terms" which were based upon substantial evidence, constituting a part of the pattern of Upjohn's fraud. The items in question are (1) testing charge reimbursements, (2) staggered price increase, (3) "out-of-spec" discount, and (4) damage claim payment.

(a) *Testing Charge Reimbursements*

In comparisons 4 and 5, Utah Foam's experts reduced Southwest Distributing's price for isocyanate by ten cents per pound because of reimbursements by Upjohn for testing charges incurred by Southwest.

Utah Foam claims that an inference properly could have been made by the jury that granting such credits in effect constituted a price reduction. Upjohn contends that it granted the credits on its good faith belief that Southwest actually incurred approximately $40,000 in testing costs and that granting such credits constituted a recognized industry custom and practice.

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Gail Vosburg, former president of Chemetics, a competitor of Utah Foam, testified that Chemetics would often ask for and get isocyanate for free for testing purposes, thus lowering its research and development costs and the effective net price of the product.[7] Vosburg testified that he negotiated for such testing material with Upjohn as well as other isocyanate suppliers in order to reduce costs.[8]

This court deems the evidence to be sufficient upon which the jury could have determined that the testing reimbursements given to Southwest by Upjohn were intended preferentially to

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7. When asked how this test material benefited Chemetics, Mr. Vosburg stated: "This was part of our R and D cost so anything we could do to reduce that by getting the isocyanate suppliers to supply material for that purpose." Vosburg agreed that rather than "using something you had to pay for, [he] would use something [he] would get for free for testing[.]" 3 Tr. (Vosburg) 17-18.

8. Mr. Vosburg stated: "We also at times asked for either free material for purposes of making tests of proprietary systems and oftentimes we got it or we would ask them to do special testing work for us . . ." 3 Tr. (Vosburg) 17.

Utah Foam also claims that Lois Valladolid, the assistant to James Burt, Upjohn's Polymer Division director, testified at trial that such credits were given in order to meet prices of competitors and to match certain benefits given by other suppliers of isocyanate. However, Utah Foam's reference to Ms. Valladolid's testimony has to do with freight allowances rather than testing charges. The transcript is as follows:

> Q: So Empro and Southwest and all of these companies, what you believe is they didn't get any benefit from getting a freight allowance more than what their actual costs may have been?

(Cont'd)

reduce and did reduce Southwest's price. Accordingly, the compensatory damages award is not reduced by $16,848 as urged by Upjohn concerning that matter.

Staggered Price Increase

Upjohn claims that in comparison 23 Utah Foam improperly used a staggered price increase to assert a loss of $15,552. Utah Foam asserts that Upjohn would benefit certain customers by timing the price increases.

A general price increase went into effect and applied to purchases by Utah Foam on and after January 1, 1980. However, the price increase was not applied to Chemetics until February 1, 1980. Chemetics was permitted to purchase isocyanate in January 1980 in competition with the higher price charged to Utah Foam in that month. Shipments to Chemetics after February 1, 1980 reflected the general price increase.

Upon review, the court finds that sufficient evidence was presented to the jury to justify its determination that the price increase on this occasion was staggered for the benefit of

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(Cont'd)

A: Well, they were getting the benefit already from our competition.

Q: All right. But if it's a benefit from the competition, then wouldn't it have been a benefit from you, also?

A: It would have been. If we wanted a piece of the business, we had to meet it or we would not have had it.

7 Tr. (Valladolid) 86.

Southwest Distributing. Accordingly, the compensatory damages award is not reduced by $15,552 as urged by Upjohn concerning the Chemetics transaction.

Out-of-Spec Discount

On occasion, isocyanate suppliers including Upjohn would experience plant outages which would result in the manufacture of "out-of-spec" product. Suppliers would then offer this material at reduced rates.

Utah Foam asserts that the "out-of-spec" designation was just another way that Upjohn would supply fully usable material to certain customers at reduced prices. Vosburg testified that Chemetics had to check the "out-of-spec" product to make sure it was "usable," but would negotiate for "out-of-spec" materials from its four isocyanate suppliers, including Upjohn.[9] The record does not reflect actual purchases by Chemetics of "out-of-spec" materials from Upjohn during the time period, but Ms. Valladolid acknowledged that Upjohn routinely granted a discount for isocyanate product which did not meet its specifications.[10]

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9. Mr. Vosburg stated that isocyanate manufacturers "would offer [out-of-spec] product to customers at a lower price." When asked if the out-of-spec product was usable he said "usually it was." 3 Tr. (Vosburg) 34.

10. Ms. Valladolid testified as follows:

> Q: If Southwest could use that material, it was satisfactory for them, why is it that you would give them a large reduction off of the price of that material?

(Cont'd)

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The comparison presented to the jury involved an "out-of-spec" shipment which had been sent by Upjohn to a customer in Illinois and was rejected because of high acidity. Southwest Distributing agreed to buy the rejected material at a discount because it was able to use material with higher acidity. Ms. Valladolid's testimony was undisputed that it would have cost more for Upjohn to reship, rework and resell the rejected material than to have it sold to Southwest.[11] This was the only specific transaction presented involving allegedly "out-of-spec" products.

On review, this court finds that the isolated transaction presented was insufficient for the jury reasonably to determine that Upjohn intended to defraud Utah Foam. Accordingly, the compensatory damage award is reduced by $3,186 as to this transaction.

(Cont'd)

> A: It may be that the customer in order to use the material in his plant may have had to make some adjustment and the two cent per pound would have made it worthwhile to him. And also to take a shipment that he was not — had not elected to take by putting an order in and that he felt maybe he was doing Upjohn a favor.

7 Tr. (Valladolid) 47.

11. Ms. Valladolid testified:

> There was a 2 cent per pound reduction given for the off-spec material. But that 2 cents per pound was more than offset in the charge it would have been for us to pay to bring the full tank car back to the plant, re-work it through production and then ship it out again to another customer.

6 Tr. (Valladolid) 225-26.

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Damage Claim Payment

In comparison 49, Utah Foam deducted a payment that Upjohn made (by way of a credit memo) to Anchor Foam to resolve a damage claim made against Upjohn on a prior shipment. Undisputed evidence was to the effect that rather than settlement by direct payment, the damage claim was resolved by granting a reduction in the price of the subsequent shipment.

On review, the court finds that the evidence presented on this matter was not sufficient for the jury reasonably to determine that Upjohn had any intent to defraud Utah Foam. Accordingly, the compensatory damage award is reduced by $6,833.89 as to this transaction.

2. *Reliance by Utah Foam on Fraudulent and/or Negligent Misrepresentations*

Upjohn claims that Utah Foam was sophisticated, knowledgeable and totally aware of the market and practice of Upjohn and other isocyanate manufacturers and sellers which granted freight allowances to customers who chose to pick up product and transport at their own expense, as well as the other allegedly preferential adjustments. Upjohn insists that Utah Foam and the industry regarded the "net delivered price" indicated on invoices as determinative of price received, and that in fact Utah Foam in virtually all instances did receive Upjohn's "best price."[12]

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12. Lois Valladolid stated that Upjohn tried to keep Utah Foam competitive in price, meaning giving it the lowest invoiced price. She said: "The invoice price is the price that we always discussed." 6 Tr.

(Cont'd)

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Bruce Wilson testified that on many occasions his company was assured by agents of Upjohn that Utah Foam was being given the "best price" on its purchases.[13]

Upon review, this court determines that the evidence at trial was sufficient for a jury to determine that Utah Foam relied upon fraudulent and negligent misrepresentations by Upjohn as to certain transactions. Accordingly, Upjohn's motion for judgment as a matter of law as to this issue is denied because the evidence was not so strong that reasonable minds could not differ.

C. *Negligent Breach of Standard of Care*

Upjohn submits that there was no evidence that its pricing practice based upon "net delivered price" failed to meet the standard of care set by the industry under Utah Foam's alternative theory of negligent misrepresentation.[14] In this

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(Valladolid) 208. When asked what the relationship of net delivered price is to the invoice price, she said: "That is the price the customer paid per pound for the product, just for the product delivered." 7 Tr. (Valladolid) 5.

13. Bruce Wilson testified that James Burt, the Polymer Division director, told him that Utah Foam was "getting the best price of anyone." Wilson remembers Burt saying that Utah Foam "was buying at the largest volume and [was] a contract customer and that that was the best there was." 2 Tr. (Wilson) 39.

14. Negligent misrepresentation is established in Utah by showing (1) a false or misleading statement, (2) failure to exercise reasonable care, (3) materiality, (4) the party making the statement was in a superior position to know the materials facts, (5) expectation that the other party would reasonably rely, (6) reasonable reliance, and (7) resultant damages
(Cont'd)

regard, Upjohn presented evidence of the standard of care in the industry as reflecting widespread use of the very practices and alleged "price adjustments" complained about by Utah Foam. Utah Foam presented evidence that the representations by Upjohn regarding "best price" upon which Utah Foam relied would have resulted in a lower *actual* price, regardless of industry practices.

Upon review, this court determines that the evidence at trial was sufficient for a jury to determine, under a negligent misrepresentation theory, that Upjohn failed to meet the standard of care which was in effect between Upjohn and Utah Foam. Accordingly, Upjohn's objection is denied because the evidence was not so strong that reasonable minds could not differ.

D. *Damages Based on Negligent Misrepresentation*

Upjohn argues as a matter of law that submission of the theory of negligent misrepresentation to the jury constituted error because in substance it permitted the jury to measure damages based upon the contractual "benefit of the bargain" standard, citing *Forsberg v. Burningham & Kimball*, 892 P.2d 23 (Utah App.1995).[15]

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suffered. *Jardine v. Brunswick Corp.*, 18 Utah 2d 378, 423 P.2d 659, 661-62 (1967); *Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302, 305 (Utah 1983); *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell*, 713 P.2d 55, 59 (Utah 1986); *see generally*, Restatement (Second) of Torts § 552 (1965). The parties do not dispute that Upjohn had a pecuniary interest in the transactions, sometimes regarded as another element of negligent misrepresentation.

15. In *Forsberg*, defendants' represented to plaintiffs that they were purchasing a lot which included a row of poplar trees, but a survey later

(Cont'd)

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Upjohn argues that Utah Foam suffered no pecuniary loss since the difference between what Utah Foam paid and what it allegedly should have paid (what its competitors paid on certain transactions) constitutes an *expectancy* of pecuniary advantage, not pecuniary loss. In this regard, Upjohn claims that Utah Foam's failure to prove market value precludes it from proving loss. Utah Foam, on the other hand, maintains that it did not need to establish market value in the usual sense in order to determine its damages because of its reliance on the special arrangement between it and Upjohn.[16]

(Cont'd)
showed that the trees were not included in the lot. The Utah Court of Appeals affirmed the trial court's finding of negligent misrepresentation and set forth the applicable measure of damages:

> The proper measure of damages in an action for negligent misrepresentation is that "necessary to compensate the plaintiff for the pecuniary loss to him which the misrepresentation is the legal cause." Restatement (Second) of Torts § 552B(1) (1976). Such damages may include "the difference between the value of what [plaintiff] has received in the transaction and its purchase price or other value given," id. § 552B(1)(a), and any "pecuniary loss suffered . . . as a consequence of the plaintiff's reliance upon the misrepresentation," id. § 552B(1)(b).

892 P.2d at 27.

16. Utah Foam argues that:

> [its] damages are illustrative of the market value of the isocyanate purchased from Upjohn. The relevant market is defined as those companies purchasing from Upjohn. The

(Cont'd)

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In this case, the relevant market as presented to the jury consisted of Utah Foam and its competitors, and damages were computed on the amount necessary to compensate Utah Foam for pecuniary losses it suffered in reliance upon Upjohns' misrepresentations. Utah Foam's losses were not what any person in the market would pay to purchase isocyanate, but what its competitors actually paid as compared with what Utah Foam had to pay. This court considers that Utah Foam presented the proper measure of damages for negligent misrepresentation under the circumstances of this case.

Upon review, it appears to the court that the evidence at trial was sufficient for a jury to determine that Utah Foam suffered damages as a result of Upjohn's negligent misrepresentations. Accordingly, Upjohn's objection is denied because the evidence was not so strong that reasonable minds could not differ.

II. *PREJUDGMENT INTEREST ON COMPENSATORY DAMAGE AWARD*

The applicable law on the issue of prejudgment interest in the State of Utah is as follows:

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> plaintiff's damages calculations merely illustrate the difference between the value of the product sold to Utah Foam and the value of the product sold to Utah Foam's competitors. That difference in value is due to the freight allowances, packaging differentials, volume rebates, and other miscellaneous credits given to the buyers.

Plaintiff's Memorandum in Opposition, p. 27.

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> [W]here the *damage is complete* and the amount of the loss is *fixed as of a particular time,* and that loss can be *measured by facts and figures,* interest should be allowed from that time and not from the date of judgment. On the other hand, where damages are *incomplete* or *cannot be calculated with mathematical accuracy* . . . the amount of the damages must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed.

Bjork v. April Indus., Inc., 560 P.2d 315, 317 (Utah 1977) (emphasis added), *cert. denied,* 431 U.S. 930, 97 S.Ct. 2634, 53 L.Ed.2d 245 (1977).[17]

The law as stated above was reaffirmed by the Supreme Court of Utah in *Cornia v. Wilcox,* 898 P.2d 1379 (Utah 1995), upholding the trial court's denial of prejudgment interest because of uncertainty in the computation of damages which couldn't be calculated with mathematical accuracy.[18] Likewise,

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17. In *Klinger v. Kightly,* 889 P.2d 1372, 1381 (Utah App.1995), the Utah Court of Appeals recently stated that when damages are "uncertain or speculative until fixed by the factfinder" prejudgment interest is not awarded. *See also Canyon Country Store v. Bracey,* 781 P.2d 414, 422 (Utah 1989); *First Security Bank of Utah v. J.B.J. Feedyards, Inc.,* 653 P.2d 591, 600 (Utah 1982); *Bellon v. Malnar,* 808 P.2d 1089, 1097 (Utah 1991); *Cornia v. Wilcox,* 898 P.2d 1379 (Utah 1995); *James Constructors, Inc. v. Salt Lake City Corp.,* 888 P.2d 665 (Utah App.1994).

18. The Utah Supreme Court noted:

> [T]he jury heard conflicting testimony from experts regarding the cattle's expected pregnancy rates, weight

(Cont'd)

prejudgment interest was denied in *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 784 P.2d 475, 483 (Utah App.1989), because damages were not "determined with mathematical precision, [and] may be inherently uncertain."[19]

In the case at bar, damages could not be calculated with certainty and the jury had to ascertain and determine the damages to be awarded from conflicting evidence, concerning adjustments in price. Also, the jury had to choose between the inconsistent methods and assumptions used by plaintiff's experts for calculation of damages. Such evidence does not constitute a valid basis for an award of prejudgment interest in Utah. *Andreason v. Aetna Casualty & Surety Co.*, 848 P.2d 171 (Utah App.1993); *Cornia*, 898 P.2d at 1386-87. It was not obvious that the damages could be arrived at and measured from facts and figures which were fixed at particular times. Price adjustments were uncertain and had to be ascertained from conflicting evidence at trial, with no mathematical accuracy. Accordingly, this court grants Defendant's Objection and denies Plaintiff's proposed award of prejudgment interest.

(Cont'd)

> range, loss rates, and market prices. In addition, the jury heard divergent evidence regarding the calves' expected gender, weight range, mortality rates, and market prices.

Cornia, 898 P.2d at 1387.

19. In *Jorgensen v. John Clay & Co.*, 660 P.2d 229, 230 (Utah 1983), prejudgment interest was allowed because damages were certain — "there was no dispute as to the number or price of the sheep that were to be sold."

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III. *PUNITIVE DAMAGES*

Pursuant to Rule 50(b) Fed.R.Civ.P., Upjohn moves for judgment as a matter of law vacating the jury's award of $5.5 million in punitive damages, claiming that no exceptional circumstances were presented to justify the award. In the alternative, Upjohn moves pursuant to Rule 59 Fed.R.Civ.P. for a new trial or remittitur on the grounds that the award is grossly excessive and violates Utah and federal law. Upjohn argues that the 17½ to 1 ratio ($5.5 million in punitives to $313,593 in compensatory damages) is presumptively excessive in Utah, and that based upon the evidence presented at trial the punitive damage award by the jury was outrageously and unreasonably excessive, apparently based upon passion and prejudice. Utah Foam claims that the punitive damage award appropriately reflects the egregious nature of Upjohn's conduct.

A. *Motion for Judgment as a Matter of Law or for New Trial*

1. *Federal Law*

The Supreme Court recently addressed the constitutionality of excessive punitive damages in *BMW of North America, Inc. v. Gore*, __ U.S. __, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).[20]

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20. In *BMW*, the Supreme Court held that a $2 million punitive damages award was grossly excessive in light of the low level of reprehensibility of defendant's conduct and the 500 to 1 ratio of punitives to compensatory damages. Defendant BMW had decided not to advise its dealers of pre-delivery damage to new cars when the cost of repair was less than 3 percent of the car's suggested retail price. The jury returned a verdict of $4,000 in compensatory damages, and $4 million

(Cont'd)

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Relative to the claim that an award of punitive damages may be violative of the Due Process Clause, the Court said:

> Only when an award can fairly be categorized as "grossly excessive" in relation to those interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.
>
> * * * * * *
>
> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.

Id. at __ and __, 116 S.Ct. at 1595 and 1598. The Court established three "guideposts" which indicate whether a punitive damage award is constitutionally excessive: (1) the degree of reprehensibility of defendant's conduct, (2) the ratio between the plaintiff's compensatory damages and the amount of the punitive damages, and (3) the difference between the punitive damages and the civil or criminal sanctions that could be imposed for comparable misconduct. *Id.* at __-__, 116 S.Ct. at 1597-1603.

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in punitive damages. The Alabama Supreme Court reduced the award to $2 million, finding that the jury improperly computed the punitive damages by multiplying the plaintiff's compensatory damages by the number of similar sales in other jurisdictions.

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Degree of Reprehensibility

As to the degree of reprehensibility, the Court stated that "punitive damages may not be 'grossly out of proportion to the severity of the offense,' "[21] and said:

> "That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award."

Id. at __, 116 S.Ct. at 1601.

Ratio Between Compensatory and Punitive Damages

As to the second guidepost, the Court noted that the ratio between compensatory and punitive damages is the "most commonly cited indicium of an unreasonable or excessive punitive damages award" and said that "exemplary damages must bear a 'reasonable relationship' to compensatory damages . . ." *Id.* at __, 116 S.Ct. at 1601. However, the Court rejected a

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21. Quoting *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22, 111 S.Ct. 1032, 1045, 113 L.Ed.2d 1 (1991). __ U.S. at __, 116 S.Ct. at 1599. The Court further stated that "some wrongs are more blameworthy than others . . . , [that] nonviolent crimes are less serious than crimes marked by violence or the threat of violence . . . ," (and that) "trickery and deceit" is "more reprehensible than negligence," id., and went on to hold that the punitive damage award against BMW was grossly excessive: "[T]he record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." *Id.* at __, 116 S.Ct. at 1601.

simple mathematical formula for establishing the "constitutional line" between excessive and non-excessive awards.[22]

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22. The Court stated:

> Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.' " In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis.

Id. at __, 116 S.Ct. at 1602 (citations omitted). As to the particular award against BMW, the Court ruled that the 500 to 1 ratio reflected a "disparity in this case" that was "dramatically greater than those considered in *Haslip* and *TXO*." *Id.* at __, 116 S.Ct. at 1601. The Court said that *Haslip's* 4 to 1 ratio did not "cross the line into the area of constitutional impropriety" although it was close. *Id.* at __, 116 S.Ct. at 1602. The Court upheld a 10 to 1 ratio in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462, 113 S.Ct. 2711, 2722, 125 L.Ed.2d 366 (1993), by relying on "the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded." *BMW*, __ U.S. at __, 116 S.Ct. at 1602.

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Sanctions for Comparable Misconduct

The Court identified civil or criminal penalties that could be imposed under state law for "comparable misconduct" as the "third indicium of excessiveness" in such awards. *Id.* at __, 116 S.Ct. at 1603. Regarding this third guidepost, the Court instructed reviewing courts to "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* (*quoting Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301, 109 S.Ct. 2909, 2934, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring in part and dissenting in part)). In this regard, the Supreme Court noted that "lesser deterrent[s]" might also adequately protect consumers." *Id.* at __, 116 S.Ct. at 1603.

Applying the aforesaid principles to the facts in *BMW*, the Court pointedly observed that "the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama . . ." *Id.* at __, 116 S.Ct. at 1603. (The maximum civil penalty for a violation of Alabama's Deceptive Trade Practices Act is $2,000.)

2. *Utah Law*

The controlling Utah law regarding punitive damages is set forth by the Utah Supreme Court in the *Crookston* decisions: *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991) ("*Crookston I*") and *Crookston v. Fire Insurance Exchange*, 860 P.2d 937 (Utah 1993) ("*Crookston II*"). In *Crookston I* the Court established guidelines that "retain the advantages of flexibility but clearly set parameters beyond which awards may not go without some expressed justification." 817 P.2d at 808. The Court acknowledged the relevance of seven

factors previously discussed by the Court in other cases and utilized them in assessing the amount of punitive damages.[23] *See Bundy v. Century Equip. Co.*, 692 P.2d 754, 759 (Utah 1984); *Von Hake v. Thomas*, 705 P.2d 766, 771 (Utah 1985). The Court noted some difficulty, however, in applying the factors without statutory relative weights, standards or formulas.[24] As to the factor of "the amount of actual damages awarded," however, the court fashioned a "reasonable and rational" test. In this regard, the Court said:

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23. The seven factors are: (I) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded. *Crookston I*, 817 P.2d at 808.

24. The Court said:

> Our cases have done little more than list these factors. No relative weights have been assigned them, and no standards or formulas have been established for properly evaluating them when making an award or when reviewing the propensity of a jury award. This makes such an enterprise highly problematic for judge and jury. The finder of fact has no guidance on how much weight to give each factor or even how the factors should be assessed. And nothing suggests to the jury or the trial court that there is any sort of limit or ceiling on an award.

Crookston I, 817 P.2d at 808. The Court noted that the "problem that results from this lack of guidance to juries and trial courts is exemplified by disparate ratios of punitive to actual damages that appear in separate cases involving similar conduct." *Id.*

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> Among the seven factors we have repeatedly listed that should be considered in determining the amount of a punitive damage award is the "amount of actual damages." *Although we have not articulated any standard for determining the importance to be assigned this factor, we have said that the amount of a punitive damage award generally must bear a "reasonable and rational" relationship to the actual damages.* The punitive damage awards we have characterized as violating this "reasonable and rational" relationship rule have been labeled *"grossly disproportionate" to the actual damages awarded* and have been said to be the result of passion or prejudice. These awards have been either reduced by the trial court directly or remanded to the trial court for further proceedings.

817 P.2d at 809-10 (emphasis added).

Under the "reasonable and rational" relationship standard articulated by the Utah high court, the "general rule" is that ratios above 3 to 1 for smaller awards (below $100,000) are excessive, and that "the acceptable ratio appears lower" than 3 to 1 for larger awards (above $100,000).[25] *Crookston I*, 817 P.2d at 810. The court cited three prior Utah cases where

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25. The Court said that "we have indicated some inclination to overturn awards having ratios of less than 3 to 1." 817 P.2d at 810. This court reads the statement by the Utah Supreme Court as indicating that even awards with ratios of less than 3 to 1 must be scrutinized and may be subject to further reduction. In this regard, in *First Security Bank v. J.B.J. Feedyards, Inc.*, 653 P.2d 591 (Utah 1982), the Court reduced an award from a 3 to 1 ratio to a 2 to 1 ratio.

punitive damages were at or above $100,000.[26] In two of the cases the awards were upheld ($500,000, a 1 to 1 ratio; and $200,000, a ½ to 1 ratio). In the other, an award of $100,000 in punitives (3 to 1 ratio) was reduced to $50,000 (2 to 1 ratio). 817 P.2d at 810. Since the ratio of compensatory to punitive damages in *Crookston I* was "much higher than in any case where we have upheld a punitive damage award,"[27] the Supreme Court of Utah remanded the case to the trial court.

In *Crookston II,* even though the 5 to 1 ratio on remand was reaffirmed by the trial court the punitive damage award was upheld. In that instance, the Utah Supreme Court declared that the punitive damages award properly could exceed the 3 to 1 ratio under its rule of thumb parameters because the trial court on remand had extensively documented the defendant's egregious conduct.[28] In upholding the award, the court reiterated

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26. *Von Hake v. Thomas*, 705 P.2d 766, 772 (Utah 1985); *Synergetics v. Marathon Ranching Co.*, 701 P.2d 1106, 1113 (Utah 1985); *First Security Bank*, 653 P.2d at 598-99.

27. The *Crookston* jury awarded $815,826 in compensatory damages and $4 million in punitive damages, a 5 to 1 ratio. 817 P.2d at 812.

28. Unlike the case at bar, the actions of defendants in the *Crookston* case were deliberate, egregious, and malicious. The Supreme Court of Utah, in reference to the trial court judge's order upholding the award, said the order demonstrates that the "fraud was calculated, willful, and particularly damaging to the Crookstons," and noted:

> First, there is a constellation of circumstances that the court cited in support of the view that Fire Insurance's actions were particularly heinous and deserving of punishment.

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that punitive damage awards beyond the 3 to 1 ratio are unique and exceptional and must be scrutinized. The court noted that such awards are presumptively invalid:

> Specifically, we said that an award exceeding the patterns of ratios observed in our prior cases raises a *presumption that the award is excessive* and that a failure by the trial court to reduce the award or order a new trial is an abuse of discretion. To overcome this presumption, the trial court must explain why this case is unique, usually in terms of one of the established seven factors or "some other factor that seems compelling."

Crookston II, 860 P.2d at 939 (emphasis added).

Notwithstanding the aforesaid, this court is satisfied that an award of some amount of punitive damages was warranted

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> These include the following: (i) the fraud practiced upon the Crookstons by Fire Insurance was of the most blatant sort, was done to save the company a relatively paltry sum, and was committed with almost certain knowledge that the Crookstons would be exposed to ruinous bankruptcy; (ii) Fire Insurance personnel were well aware that their actions would deprive the Crookstons of precisely the protection from catastrophic losses that the insurance policy was purchased to protect against; (iii) the supervisors involved found nothing objectionable about the fraudulent conduct of their subordinates and, in fact, praised it as sound business practice; and (iv) the consequences of the fraud on the financial and mental health of the Crookstons were devastating.

Crookston II, 860 P.2d at 940.

under both federal and Utah law. The evidence was not so strong or not so lacking in clarity or being convincing on the issue of recklessness and deliberate disregard for the rights of others that reasonable minds could not differ thereupon. The court finds and rules as a matter of law, however, that the evidence was such that no reasonable jury could have found punitive damages for "willful and malicious" conduct which is the alternative ground under Utah law for awarding punitive damages. Accordingly, the court determines that only upon the lesser and less egregious alternative of deliberate indifference could a reasonable jury have awarded any punitive damages, and on that ground the motion of Upjohn for judgment as a matter of law or in the alternative for new trial is denied.

The court now turns to the alternative motion for remittitur.

B. *Motion for Remittitur*

The award of $5.5 million punitive damages as related to the award of $313,593 in compensatory damages, a 17½ to 1 ratio, constitutes an award which is presumptively excessive under Utah law.[29] It is a greater punitive damages award than has ever been reviewed by the Utah Supreme Court.[30]

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29. Taking into consideration the reductions of $10,019.89 ordered by the court as to compensatory damages, the ratio is increased to 18 to 1.

30. In 1987 a jury in the state Third District Court returned a verdict of $500,000 compensatory damages and $10 million punitive damages in favor of plaintiff Mae Roberts who was injured when a cap on a 2-liter 7-Up bottle whizzed off and struck her eye. The trial judge reduced the total damages (compensatory and punitive) to $375,000. The case (Cont'd)

Accordingly, this court scrutinizes the award under the seven factors identified by the Supreme Court of Utah, as well as the additional relevant factors of safety concerns (economic damages versus personal injuries), and sanctions for comparable misconduct in Utah.

1. *The nature of the wrongdoer's acts*

Utah Foam presented 59 comparative transactions to show that it did not receive Upjohn's lowest *actual* price. Plaintiff's experts testified that in 59 of the 112 purchases Utah Foam made from Upjohn between 1978 and 1985 it paid more than its competitors. The experts had "about 160 or 170 invoices" which reflected "a lower price than what Utah Foam was paying at that period of time" but chose to claim damage for only the 59 comparisons. This was in part due to the fact that "most of the invoices would not have changed the damage calculations" or the economic loss was "not as great as the invoices selected."[31] In contrast, Upjohn demonstrated at trial that it gave Utah Foam the best "net delivered price," or invoice price.[32]

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was not appealed. In 1993 a Tooele County jury returned a verdict of $154 million compensatory damages and $250 million punitive damages against Getty Oil in a gold mining case, but the trial judge granted judgment notwithstanding the verdict and the Supreme Court of Utah affirmed. *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060 (Utah 1996).

31. 5 Tr. (Peterson) 67-68.

32. Upjohn presented a compelling case based on the net delivered invoice price given to Utah Foam as compared with its competitors. All transactions were thoroughly documented and compared, and Upjohn

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It was apparent from the evidence at trial that there was never a meeting of the minds between Upjohn and Utah Foam over the meaning of "best price" or "price." From conflicting evidence, the jury determined that Utah Foam suffered damages in reliance upon its understanding of "best price" based upon unwarranted adjustments granted to its competitors.

2. *The facts and circumstances surrounding the wrongful acts*

There was no evidence at trial of a course of conduct which was egregious and calculated, as was the situation in *Crookston I*.[33]

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presented evidence that the adjustments which were given did not constitute price adjustments as such. Defendant's expert, James Kearl, testified from a detailed analysis of all comparative transactions that "Utah Foam has a net advantage on [the 59 comparison] transactions." 7 Tr. (Kearl) 126. However, Upjohn knew that the final cost to the customer was not just the invoice price, but that such would be affected by and lowered by adjustments to price, including credits, discounts, and allowances. 6 Tr. (Forest) 70-71.

33. Upjohn's actions are clearly far less egregious than the conduct involved in *Crookston*. In *Crookston II*, the Court noted that the "fraud practiced upon the Crookstons by Fire Insurance was of the most blatant sort . . ." and that defendant's knew that the Crookstons would be exposed to "ruinous bankruptcy" as a result of its actions. 860 P.2d at 940. Lois Valladolid testified that Upjohn gave considerable attention to Utah Foam:

> Q: And in those conversations with Jim Burt, did you talk about how Upjohn was going to treat Utah Foam and Mr. Wilson?

(Cont'd)

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The isocyanate market was highly competitive during the time period in question. Even though Upjohn established at trial that it was favoring Utah Foam by providing low net delivered prices on bulk purchases, Utah Foam presented evidence that Upjohn failed to pass along to Utah Foam some of the "benefits" it gave to competitors of Utah Foam. In the 59 comparative transactions presented at trial, adjustments given by Upjohn sometimes were not reflected on invoices and in some cases credits or adjustments were established after the fact. An Upjohn salesperson's overzealous negotiation of favorable freight rates which would affect the actual price for isocyanate sales by Upjohn is reflected in an internal memo to the central Upjohn officer. He wrote: "How much [freight allowance] can we get away with?" The cost of freight in that instance was 1.5 cents per pound but the allowance given was 8.4 cents per pound.[34] Also, Utah Foam presented evidence of

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(Cont'd)

> A: We didn't talk per say about how you treated him because we always felt we treated him — he was considered a primary customer. And every undertaking that went on in the office, whenever a discussion was made about systems suppliers, Utah Foam, Bruce was always, always mentioned. He was always considered.
>
> Q: Did you ever have any discussions with Mr. Burt about how you were going to treat Utah Foam in comparison with the other systems houses that he was competing against?
>
> A: We always had to keep Bruce Wilson of Utah competitive. We always had to do that.

6 Tr. (Valladolid) 206-07.

34. 7 Tr. (Valladolid) 11; Exh. 9G and 9K.

transfers by Upjohn as a manufacturer of isocyanate to its distributing "systems house" where lower price sales were made in competition with Utah Foam and other isocyanate distributors.[35]

3. *The amount of actual damages*

Based on comparative specific transactions, the jury awarded $313,593 in compensatory damages. As determined in this opinion, the figure is reduced by $10,019.89 to a net compensatory award of $303,573.11.

4. *The probability that the wrongdoer might act in the same way in the future*

Upjohn sold its Polymer Division and entire isocyanate operation in 1985 and has not been in the business since then. None of the employees involved in the misrepresentations are now employed by Upjohn. Nothing in the record indicates a probability that Upjohn will engage in such activity or repeat these actions in the future.

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35. The transfers from Upjohn to one of its own divisions did not constitute "sales" and such transfers at internally established "prices" were not per se illegal or improper. However, Mr. Wilson testified that even as to the CPR systems house of Upjohn, Utah Foam had been assured (because of the "best price" arrangement) that it was "at no disadvantage" in the market. 2 Tr. (Wilson) 42. Mr. Wilson testified that it was unfair that Upjohn was able to price and "sell their materials . . . through a distributor cheaper than what I could sell as a manufacturer on a direct basis." 2 Tr. (Wilson) 55.

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5. *The relationship of the parties*

Utah Foam and Upjohn had a long term business association which began in 1973. At that time, Utah Foam faced financial ruin because its isocyanate supplier at the time was unable to supply product. Upjohn stepped in and literally saved the company.[36]

Utah Foam became one of Upjohn's largest "system house" purchasers. It was a contract customer and renewed its contract each year. In 1975 Utah Foam contracted to purchase 50% of its requirements from Upjohn. This increased to 95% by 1985. Although Utah Foam was given oral assurances that it was receiving Upjohn's "best price", nowhere in its contracts did it say that Utah Foam was to receive Upjohn's "best" or "lowest" price.

Utah Foam often communicated to Upjohn that it was suffering competitive pressures and needed some relief, and Upjohn sent representatives to Utah Foam regularly in order to maintain their relationship and assess Utah Foam's needs. On one occasion, the director of the Polymer Division traveled to

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36. Bruce Wilson testified that:

> [Utah Foam] developed a very strong loyalty to Upjohn. And the basic reason for that is that if they had not been able to pick us up the chances are that we would not have survived the '73 to '75 time period with the shortage. And because of the fact they did, and did their best in our opinion to take care of us during that time period, we have had a tremendous loyalty to them.

2 Tr. (Wilson) 67.

Utah and lowered Utah Foam's price three cents per pound. Later, an Upjohn salesperson lowered Utah Foam's price two cents per pound.[37] After purchasing two million pounds of isocyanate, as a favored contract purchaser, Utah Foam received retroactively a one cent per pound rebate. Utah Foam received further rebates at higher level purchases.

As a result of a steady supply of isocyanate by Upjohn, Utah Foam was able to experience significant growth in the late 1970s, peaking in 1980 at sales of 6 million pounds.

Utah Foam was the purchaser of isocyanate which Upjohn manufactured and sold, but Upjohn was not a fiduciary to Utah Foam. Utah Foam retained the right to purchase isocyanate from other manufacturers if it so desired and receive credit on the Upjohn contract if the purchases were at a lower price.[38] In fact, Utah Foam entertained other offers.[39] Mr. Wilson recalled

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37. Bruce Wilson testified that "Mr. Raymore on his first visit on his own authority lowered our price two cents a pound." 2 Tr. (Wilson) 54.

38. The contract allowed Utah Foam "to purchase product of equal quality and like quantity and on similar terms from others at a lower price than is in effect hereunder" to which Upjohn had the option of "either supply[ing] such shipment at lower price or permit[ting Utah Foam] . . . to purchase such quantity elsewhere and the quantity so purchased elsewhere will be deducted from the total quantity of this contract." 2 Tr. (Wilson) 75.

39. Mr. Stephen Forest, an Upjohn salesperson, read the following sales report into evidence:

> Bruce says thank you for the one cent rebate. Bruce feels that his price might be a little high. . . . Bruce says he will

(Cont'd)

that isocyanate sales to Utah Foam's Canadian affiliate, Universal Foam, "could be added to [the Utah Foam-Upjohn] contract," and thus establish a more lucrative volume rebate for Utah Foam.[40]

In essence, both Upjohn and Utah Foam were sophisticated business entities with considerable knowledge about the isocyanate industry, and in many transactions operated on an arms length basis.

6. *The effect of the misconduct on the lives of the victim and others*

Utah Foam suffered an annual loss of approximately $40,000 during the eight year period it claimed damages. This

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(Cont'd)

> buy a truckload from Rubicon because he owes Lee a favor. Business is very good for the contracting firm and pretty good for the systems business. Bruce didn't have anything to complain about this time.

5 Tr. (Forest) 145-146. Another sales report read:

> Rubicon came in and told Bruce that the price per bulk was 66 cents per pound 30 days. I adjusted Utah Foam's price to 67 cents per pound, less one cent for volume, (two million pounds). Bruce would not give me the price, but I believe BASF is selling drums to Universal at approximately 75 cents per pound, any quantity, because BASF is warehousing for Universal Foam in Calgary.

5 Tr. (Forest) 146.

40. 2 Tr. (Wilson) 82.

represents less than 1-2% of Utah Foam's approximately $2.3 to $4.8 million in annual isocyanate sales. Utah Foam presented evidence that if the aforesaid losses had not occurred it could have positively improved the position of the company. However, Utah Foam was not constrained to file for bankruptcy protection or go out of business during the period or at any time.

7. *The relative wealth of the wrongdoer.*

The jury was instructed that at the end of 1994 Upjohn's net worth was $2.3 billion. At trial the jury learned that Utah Foam's net worth was over $1 million and that Upjohn's isocyanate division was sold in 1985 for $232 million.

Counsel for Utah Foam spent a considerable portion of his argument addressing the jury regarding Upjohn's wealth in competition with punitive damages, asserting that Upjohn could easily absorb any compensatory damage award as a cost of doing business and that a "company of such size would feel no punishment or pain in paying a punitive award of 5.5 million."[41]

Plaintiff places particular emphasis upon the factor of wealth in justification of the punitive damages award. In emphasizing Upjohn's wealth and its ability as a large international corporation to pay such an award, plaintiff cites *Behrens v. Raleigh Hills Hospital,* 675 P.2d 1179, 1187 (Utah 1983). In that case, the Supreme Court of Utah stated that punitive damages may "be appropriate to take the profit out of wrongdoing where compensatory damages are small in relation to the financial resources of a defendant and can be subsumed

41. Plaintiff's Memorandum in Opposition, p. 16.

as a cost of doing business." However, absent from the decision is any discussion of factors which would support imposition of large punitive damage awards.[42]

Plaintiff relies upon several cases where large punitive damage awards have been upheld against wealthy defendants. In *Capstick v. Allstate Ins. Co.*, 998 F.2d 810 (10th Cir.1993), a $2 million punitive damages award (with $4,500 compensatory damages, a 444 to 1 ratio) was upheld. The court reasoned that in order to meet the purpose of the Oklahoma law which was "to punish and deter the wrongdoer," the damage "award must be sufficient to attract the attention of the defendant in order to assure that oppressive practices do not continue." *Id.* at 823.[43] In *Eichenseer v. Reserve Life Ins. Co.*,

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42. The court addressed whether punitive damages may be awarded in a wrongful death action and cautioned that punitive damages should be awarded infrequently, and "only when they will clearly accomplish a public objective not accomplished by the award of compensatory damages." The Court further stated that the "intended deterrent effect must be clear and in proportion to the nature of the wrong and the possibility of recurrence." *Behrens*, 675 P.2d at 1187.

43. In *Capstick*, plaintiff filed his claim with its automobile insurer after an accidental fire completely destroyed his car. However, defendant denied coverage and informed plaintiff that the "fire appears to be of incendiary origin for which you are responsible." 998 F.2d at 812. Nearly from the beginning, defendant believed that plaintiff had set his car on fire; witnesses and other evidence in support of plaintiff's story were ignored. The court determined that the evidence indicated that

> Allstate's conduct was *particularly egregious and wrongheaded, clearly oppressive and "evidencing a wanton or reckless disregard"* for Capstick, its insured. It is

(Cont'd)

934 F.2d 1377 (1991), the Fifth Circuit justified a large award with a high ratio (500 to 1 ratio) because the defendant's conduct "was particularly egregious" (since it) "acted with reckless disregard — if not intentional disregard — for the rights of its insured." Such conduct was a "significant factor" which supported the award.[44] In *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir.), *cert. denied*, 503 U.S. 1011, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1991) the court acknowledged that the $6.1 million punitive damages award in this multiple-plaintiff asbestos injury case was high, but upheld the award because it—

(Cont'd)

> significant that Allstate specifically and repeatedly labeled Capstick as an arsonist and one who intended to pursue an insurance fraud. These are significant factors which support the punitive award in this case.

Id. at 821 (emphasis added). What was of particular concern to the court was that the defendant's employees, including high ranking officials, testified that they would continue to handle future claims of this type in the same manner. *Id.* at 823.

44. Plaintiff submitted a claim of $6,658.35 under her major medical policy for a hysterectomy, yet *defendant denied her claim without reviewing any medical records to support its decision*, merely stating that the acute pelvic inflammatory disease that she had was a preexisting illness which the policy did not cover. Defendant *continued to deny coverage* despite plaintiff's efforts to enlighten the defendant, including the submission of medical records and her doctor's affidavit. During pretrial discovery, some three years later, defendant paid plaintiff's claim. Still, plaintiff pursued the action for extracontractual damages and punitive damages. After a bench trial, the district court judge awarded plaintiff $1,000 in compensatory damages and $500,000 in punitive damages. 934 F.2d at 1379-80.

did not violate Texas' rule that punitive damages awards be reasonably proportioned to actual damages.[45]

Plaintiff cites *Spaeth v. Union Oil Co. Of California,* 762 F.2d 865 (10th Cir.1985) as an example where the defendant wealth justifies a large award. But the court merely stated that the "wealth of the defendant and the risk created by the defendant's conduct are substantial factors to be considered in calculating punitive damages." *Id.* at 866.[46] Plaintiff also cites to *Harrell v. Old American Ins. Co.,* 829 P.2d 75 (Okl.Ct.App.1991), where a 6 to 1 ratio was upheld ($250,000 punitives to $41,800 compensatory damages). However, Old American's wealth was just one factor among many which the court considered.

Manifestly, wealth alone does not justify imposition of a disproportionately large punitive damage award. Indeed, retired Supreme Court Justice White sitting by designation on the Eighth Circuit observed that while "a defendant's wealth may be taken into account in order to ensure that an award will adequately deter any future such conduct, a defendant's wealth cannot alone justify a large punitive damages award." *Pulla v. Amoco Oil Co.,* 72 F.3d 648, 659 n. 16 (8th Cir.1995) (*citing*

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45. Based on compensatory damages of $317,000, the ratio is 19 to 1. In Texas the proportionality requirement does not set forth a specific ratio. After considering five factors under Texas law, the court determined that the award was not excessive and was reasonably proportioned to actual damages. 946 F.2d at 1095-96.

46. Even though the defendant's conduct in *Spaeth* was *egregious* and it had *maliciously* allowed drainage off plaintiff's gas and opposed her efforts for relief, the jury's award was reduced from $3 million to $2 million. 762 F.2d at 867.

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TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462-64, 113 S.Ct. 2711, 2723, 125 L.Ed.2d 366 (1993).[47]

This court concludes that none of the relevant seven factors repeatedly listed by the Utah court, except a bald comparison of relative wealth, clearly weighs in favor of Utah Foam.

8. *Safety Concerns: Economic Damages Verses Personal Injuries*

An additional factor of relevance in scrutinizing a punitive damages award is the nature of the injuries suffered. In this regard, in *BMW*, the Supreme Court noted that the "harm BMW inflicted on Dr. Gore was purely economic in nature," and that BMW's actions did not affect the car's safety or performance and "evinced no indifference to or reckless disregard for the health and safety of others." __ U.S. at __, 116 S.Ct. at 1599. The Court said:

> To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

Id.

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47. Thaddeus Pulla sued his employer, Amoco, for allegedly examining his credit card records in order to determine whether he was abusing his sick leave. On an invasion of privacy claim, the jury awarded plaintiff two dollars in actual damages, one for past pain and suffering and one for future pain and suffering. The jury returned a verdict of $500,000 in punitive damages. 72 F.2d at 653.

Although Upjohn was aware of Utah Foam's competitive pressures, its actions did not have any safety implications. The damages suffered by Utah Foam were wholly economic.

9. *Sanctions for Comparable Conduct in Utah*

Another important factor to be taken into consideration in the scrutiny analysis, as discussed by the Supreme Court in *BMW*, is a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, __ U.S. at __, 116 S.Ct. at 1603.

In Utah, monetary sanctions which might be imposed for arguably comparable misconduct include penalties set forth in the Pattern of Unlawful Activity Act,[48] the Unfair Practices Act,[49] and the Antitrust Act.[50] None of the sanctions which could be imposed in these assumed comparables approach the $5.5 million punitive damages award in this case. To the contrary,

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48. Under the Pattern of Unlawful Activity Act an injured person may recover twice the damages he sustains, plus reasonable attorneys fees. If a crime is involved the maximum fine which could be imposed by state action under the statute is $10,000 for each offense. U.C.A. §§ 76-10- 1603.5(1), 76-10-1605(1) and 76-3-301.

49. Treble damages or $2,000, whichever is greater, may be imposed as damages for using "unfair methods of competition in commerce or trade" in violation of the Unfair Practices Act. U.C.A. § 13-5-14.

50. Under the Antitrust Act a private person could be awarded three times the amount of the damages sustained, plus attorneys fees. In addition, in a proper case fines could be imposed by the state. U.C.A. §§ 76-10-919(1) and 76-10-920(1) (1979).

under the circumstances of this case, the comparisons demonstrate that the $5.5 million punitive damage award is excessive and far out of step with even maximum monetary sanctions.

On review of the evidence at trial, this court considers that the punitive damages award in this case could neither withstand constitutional scrutiny under *BMW,* nor the "reasonable and rational" scrutiny required under Utah law. This court determines that no exceptional circumstances were presented to justify the grossly excessive punitive damages award in this case. The relationship between compensatory and punitive damages was not reasonable and rational. In this regard, the ratio between the amount of actual damages awarded and the amount awarded as punitive damages is grossly excessive. Furthermore, the punitive damages award does not appropriately reflect the level of Upjohn's misconduct. Decidedly, no egregious conduct was presented which would justify the amount of the award based upon clear and convincing evidence.

Based upon the foregoing, this court grants a remittitur to a ratio of 2 to 1. In accordance with the revised compensatory damages award reflected in this opinion, the punitive damages award is reduced to $607,146.22.

IV. POST JUDGMENT INTEREST RATE

With respect to the judgment rate applicable to post judgment interest, 28 U.S.C. § 1961(a) provides:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such

> interest shall be calculated from the date of the entry of judgment, . . .

Post-judgment interest begins to accrue on a judgment on the date the fees were "meaningfully ascertained and included in a final appealable judgment." *MidAmerica Federal Savings & Loan Assoc. v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1475 (10th Cir.1992). Plaintiff claims that the post judgment interest rate should be determined under Utah law. However, under *Everaard v. Hartford Acc. & Indem. Co.*, 842 F.2d 1186, 1193 (10th Cir.1988), federal law governs the post-judgment interest rate, even in diversity cases. The rate of interest on March 1, 1996, and March 4, 1996 when the verdicts were returned on compensatory and punitive damages, respectively, was 5.25% per annum. Accordingly, interest should accrue on the awarded amounts on and after those dates.

Based upon the foregoing, it is hereby

ORDERED, that defendant's motion for judgment as a matter of law or for new trial, as to both compensatory damages and punitive damages, is Denied; it is

FURTHER ORDERED, that the compensatory damages award in favor of plaintiff is reduced to $303,573.11; it is

FURTHER ORDERED, that defendant's Objection to an award of prejudgment interest on the verdict for compensatory damages in favor of plaintiff is Granted; it is

FURTHER ORDERED, that defendant's motion for remittitur as to the punitive damages award is Granted and the award is reduced to $607,142.22; it is

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FURTHER ORDERED, that post judgment interest shall accrue at the rate of 5.25% per annum, from and after March 1, 1996, on the adjusted compensatory damages award of $303,573.11; it is

FURTHER ORDERED that post judgment interest shall accrue at the rate of 5.25% per annum, from and after March 4, 1996 on the adjusted and reduced punitive damages award of $607,142.22.

Counsel for defendant is directed to prepare and lodge with the court a form of judgment consistent with this Memorandum Decision and Order after first complying with local Rule 206(b).

IT IS SO ORDERED.

APPENDIX E — OBJECTION TO DENIAL OF REHEARING AND REQUEST FOR RULING DATED AND FILED OCTOBER 27, 1998

C. RICHARD HENRIKSEN, JR., #1466
RALPH W. CURTIS, #6859
HENRIKSEN & HENRIKSEN, P.C.
Attorneys for Appellant/Cross Appellee
320 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 521-4145

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Civil No. 97-4007, 97-4008

UTAH FOAM PRODUCTS CO., a Utah Corporation,

Plaintiff/Appellant,
Cross Appellee,

v.

UPJOHN COMPANY, a Delaware Corporation, and DOES I-X,

Appellee/Cross Appellant.
Cross Appellant.

OBJECTION TO DENIAL OF REHEARING AND REQUEST FOR RULING

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH — CENTRAL DIVISION

Appendix E

C. RICHARD HENRIKSEN, JR.
RALPH W. CURTIS,
HENRIKSEN & HENRIKSEN, P.C.
Attorneys for **Plaintiff/Appellant**
320 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 521-4145

STEPHEN B. NEBEKER
JONATHAN A. DIBBLE
RICK B. HOGGARD
RAY, QUINNEY & NEBEKER
Attorneys for **Defendant/Appellee**
P. O. Box 45386
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Pursuant to 10th Circuit Rule 27.3, and Rule 40 of the Federal Rules of Appellate Procedure, Appellant/Cross Appellee, Utah Foam Products, respectfully objects to the Court's denial of rehearing, and requests that the Court rule on the merits of the Petition for Rehearing. On October 14, 1998, the Court entered an Order denying the Appellant's Petition for Rehearing on the grounds that said Petition was not timely. The Order also stated that the Suggestion for Rehearing En Banc had been submitted to all judges of the Court, but such suggestion was also denied.

The Appellant objects to the Court's order on the basis that the Appellant believes the Petition for Rehearing was filed in a timely manner. As set forth in the accompanying affidavits, counsel for the Appellant contacted the clerk of the court on September 11, 1998, to verify when the Petition for Rehearing

must be filed with the Court. According to the clerk, and pursuant to Rules 26 and 40 of the Federal Rules of Appellate Procedure, the Petition needed to be post marked on September 18, 1998, in order to be considered timely by the court. (See attached Affidavit of Counsel).

On September 18, 1998, and employee of counsel for the Appellant delivered the original and all copies of the Petition for Rehearing to the Salt Lake City Post office, paid the postage fee, and verified that the Petition was postmarked on that date. (See attached Affidavit of Randall R. Sjoblom). Based on these actions, the Appellant has done everything necessary to comply with the clerk of the Court's instructions. Therefore, the Petition for Rehearing was filed in a timely manner, and the Court's October 14, 1998 ruling is in error.

The Appellant notes that this objection is not a motion for reconsideration, which is specifically prohibited by Rule 40.3 of the 10th Circuit Rules. Rather with this objection, the Appellant asks the Court to rule on the merits of the Petition for Rehearing, and to address the significant factual and legal concerns raised in that Petition.

WHEREFORE, based on the foregoing, and in light of the foregoing objection, the Appellant respectfully requests the Court for a ruling on the merits of the Appellant's Petition for Rehearing and Suggestion for Rehearing en Banc.

DATED this 27th day of October, 1998.

HENRIKSEN & HENRIKSEN, P.C.

s/ Ralph W Curtis
C. Richard Henriksen, Jr.
Ralph W. Curtis
Attorneys for Appellant/Cross Appellee

Appendix E

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of October, 1998, a true and correct copy of the foregoing **OBJECTION TO DENIAL OF REHEARING AND REQUEST FOR RULING** was mailed, postage prepaid, via U.S. mail, to the following:

STEPHEN B. NEBEKER
JONATHAN A. DIBBLE
RICK B. HOGGARD
RAY, QUINNEY & NEBEKER
Attorneys for **Defendant/Appellee**
P. O. Box 45386
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

s/ Ralph W. Curtis

Appendix E

C. RICHARD HENRIKSEN, JR., #1466
RALPH W. CURTIS, #6859
HENRIKSEN & HENRIKSEN, P.C.
Attorneys for Appellant/Cross Appellee
320 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 521-4145

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Civil No. 97-4007, 97-4008

UTAH FOAM PRODUCTS CO., a Utah Corporation,

Plaintiff/Appellant,
Cross Appellee,

v.

UPJOHN COMPANY, a Delaware Corporation, and DOES I-X,

Appellee/Cross Appellant.
Cross Appellant.

AFFIDAVIT OF RANDALL SJOBLOM

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF UTAH —
CENTRAL DIVISION

Appendix E

C. RICHARD HENRIKSEN, JR.
RALPH W. CURTIS,
HENRIKSEN & HENRIKSEN, P.C.
Attorneys for **Plaintiff/Appellant**
320 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 521-4145

STEPHEN B. NEBEKER
JONATHAN A. DIBBLE
RICK B. HOGGARD
RAY, QUINNEY & NEBEKER
Attorneys for **Defendant/Appellee**
P. O. Box 45386
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

STATE OF UTAH)
:ss
County of Salt Lake)

RANDALL R. SJOBLOM, being duly sworn upon his oath, hereby deposes and states as follows:

1. I am an employee of the law firm of Henriksen & Henriksen, P.C., in Salt Lake City, Utah.

2. On September 18, 1998, I assisted in preparing for mailing an original and several copies of a Petition for Rehearing and Suggestion for Rehearing En Banc in the above captioned case.

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3. After the Petition and copies were prepared for mailing, I personally carried the Petition and copies to the Salt Lake City Post Office, located at 230 West 200 South.

4. At the above stated post office, I paid the postage fees for sending the Petition to the United States Courthouse in Denver, Colorado, and I verified that the post mark on the materials was dated September 18, 1998.

5. All of the above stated activities were completed before 4:30 p.m. on September 18, 1998.

FURTHER AFFIANT SAITH NAUGHT.

s/ Randall R. Sjoblom

SUBSCRIBED TO AND SWORN before me on this 27 day of October, 1998.

s/ Julie C. Hempel
NOTARY PUBLIC
Residing at Salt Lake County, Utah

Appendix E

C. RICHARD HENRIKSEN, JR., #1466
RALPH W. CURTIS, #6859
HENRIKSEN & HENRIKSEN, P.C.
Attorneys for Appellant/Cross Appellee
320 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 521-4145

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Civil No. 97-4007, 97-4008

UTAH FOAM PRODUCTS CO., a Utah Corporation,

Plaintiff/Appellant,
Cross Appellee,

v.

UPJOHN COMPANY, a Delaware Corporation, and DOES I-X,

Appellee/Cross Appellant.
Cross Appellant.

AFFIDAVIT OF COUNSEL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH — CENTRAL DIVISION

Appendix E

C. RICHARD HENRIKSEN, JR.
RALPH W. CURTIS,
HENRIKSEN & HENRIKSEN, P.C.
Attorneys for **Plaintiff/Appellant**
320 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 521-4145

STEPHEN B. NEBEKER
JONATHAN A. DIBBLE
RICK B. HOGGARD
RAY, QUINNEY & NEBEKER
Attorneys for **Defendant/Appellee**
P. O. Box 45386
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

STATE OF UTAH)
:ss
County of Salt Lake)

RALPH W. CURTIS, being duly sworn upon his oath, hereby deposes and states as follows:

1. I am an attorney in good standing in the State of Utah, and currently admitted to practice before the United States Court of Appeals for the 10th Circuit.

2. I am one of the attorneys representing the Appellant, Utah Foam Products Company, in the above captioned case.

3. On September 11, 1998, I placed a telephone call to the clerk's office at the 10th Circuit Court building in Denver,

Colorado. My purpose in making the telephone call was to verify the deadline for filing the Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc.

4. When I contacted the clerk's office on September 11, 1998, I spoke with an individual named "Maria." I was informed by this individual that pursuant to Rules 26 and 40 of the Federal Rules of Appellate Procedure, the Petition for Rehearing needed to postmarked, by the U.S. Postal Service, no later than September 18, 1998 for the Petition to be considered filed in a timely manner.

5. The Petition for Rehearing was finalized, signed, post marked, and mailed on September 18, 1998.

FURTHER AFFIANT SAITH NAUGHT.

s/ Ralph W. Curtis
Ralph W. Curtis

SUBSCRIBED TO AND SWORN before me on this 27 day of October, 1998.

s/ Julie C. Hempel
NOTARY PUBLIC
Residing at Salt Lake County, Utah